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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GULF STATES STEEL, INC. OF ALABAMA,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court of appeals has the power to modify *de facto* a final antitrust consent decree by issuing a mandate that reverses orders, entered by the supervising district court to enforce environmental obligations assumed under the decree, without a showing on the public record which "establishes that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance," as this Court recently held Federal Rule of Civil Procedure 60(b) requires.

2. Whether a federal court of appeals has the power to conclude that the Rules Enabling Act, 28 U.S.C. § 2072(b) (1988), prohibits a district court from accepting a voluntary deposit of over $31 million of disputed funds, proffered under Federal Rule of Civil Procedure 67, as payment in full, if it terminates the accrual of additional default interest upon full payment of these funds into escrow so that a litigant's right to the funds may be adjudicated.

LIST OF PARTIES
TO THE PROCEEDING
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LTV CORPORATION, LTV STEEL
COMPANY, INC., AND GULF STATES
STEEL CORPORATION
Appellants

GULF STATES STEEL, INC. OF ALABAMA
Appellee

OFFICIAL COMMITTEES
OF UNSECURED CREDITORS
OF THE LTV CORPORATION AND
LTV STEEL CORPORATION, INC.
AND CERTAIN AFFILIATES
Amicus Curiae for Appellants

JAMES H. EVANS
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STATE OF ALABAMA
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IN THE

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OCTOBER TERM, 1992

No. 92-____

GULF STATES STEEL, INC. OF ALABAMA,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Gulf States Steel, Inc. of Alabama ("GSSI"),* the defendant below, hereby petitions for issuance of a writ of certiorari to review the June 12, 1992 decision and August 4, 1992 mandate, of the United States Court of Appeals for the District of Columbia Circuit in *LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050 (D.C. Cir. 1992).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") is reported at 969 F.2d 1050 (D.C. Cir. 1992) (Wald, J.), and is reprinted in the appendix hereto as Appendix A. The opinion of the United States District Court for the District of Columbia ("District

* Petitioner Gulf States Steel, Inc. of Alabama, has no parent companies, or subsidiaries to report under Rule 29.1 of this Court.

Court") is reported at 133 B.R. 665 (D.D.C. 1991) (Pratt, J.), and is reprinted in the appendix hereto as Appendix B.

The opinion of the District Court in the related case, *United States v. LTV Corp.*, No. 84-0884 (D.D.C.), is reported at 1984-2 Trade Cas. (CCH) ¶ 66,133 (D.D.C.) (Pratt, J.), and is reprinted in the appendix hereto as Appendix I.

Other relevant orders of the District Court are unreported, but are reprinted in the appendix hereto as Appendices C-H, J-M.

JURISDICTION

The opinion and judgment of the Court of Appeals was decided and entered on June 12, 1992. GSSI's timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on July 28, 1992. *See* Pet. App. M, at 120a.**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The following statutes and rules are reprinted in the appendix hereto as Appendix N:

15 U.S.C. § 16(b)-(h)

15 U.S.C. § 18

28 U.S.C. § 2072(b)

Rule 60(b), Federal Rules of Civil Procedure

Rule 67, Federal Rules of Civil Procedure

** References to the Appendix are designated as "Pet. App. ___, at ___a."

STATEMENT OF THE CASE

1. The District Court's Entry Of The Antitrust Consent Decree As A Final Judgment Was In The Public Interest.

On March 21, 1984, the United States challenged under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, LTV Corporation's ("LTV") proposed acquisition of Republic Steel Corporation, because it significantly increased concentration in the manufacture and sale of carbon and alloy hot and cold rolled steel. A consent decree was negotiated to allow LTV to consummate the acquisition if it promptly divested two steel mills, one of which was located in Gadsden, Alabama.[1] *See* Pet. App. I, at 67a; JA43-JA61.*** LTV agreed that if the Gadsden divestiture did not take place within six months after entry of the consent decree as a final judgment, a trustee could be appointed by the District Court with

> the power to require [LTV] to divest assets only, *retaining and assuming all liabilities of Gadsden . . . upon their divestiture.*

*** "JA ___" citations refer to the Joint Appendix in the Court of Appeals, a copy of which will be lodged with this Court.

[1] On April 5, 1984, the proposed consent decree was placed on the public record, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1988) ("Tunney Act"). *See* 49 Fed. Reg. 13,603 (Apr. 5, 1984). The Tunney Act requires the United States to publish in the Federal Register the text of a proposed antitrust consent decree to which it is a party, together with a competitive impact statement. This procedure provides interested non-parties with an opportunity to comment upon or criticize the terms of a proposed antitrust settlement and for the United States to respond on the public record before a district court is asked to enter it as a final judgment. The Tunney Act also requires, before a proposed antitrust consent decree is so entered, that the district court determine "the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (1988).

See Pet. App. I, at 98a; JA49 (emphasis added).

The District Court was urged to reject the proposed consent decree, among other reasons, because it was predicted that no buyer would purchase the Gadsden plant with its long-standing history of environmental problems. *See* 49 Fed. Reg. 29,288, at 29,288-309, 29,320-33 (July 19, 1984). As Wheeling-Pittsburgh Steel Corporation stated during the Tunney Act proceedings:

> When the tenuous character of this [Gadsden] divestiture is recognized its value as a curative measure shrinks to deminimus. [sic]
>
> . . . .
>
> [T]he Department has chosen to depart from its standard "fix-it-first" practice and let the merger go forward with *no* assurance that this divestiture will take place or that, if it does, that the plant will be operated by an effective competitor. [Emphasis in orginal.]
>
> This very substantial doubt is heightened by the following facts about the Gadsden plant:
>
> . . . .
>
> (3) In December 1982, Republic entered into a consent order with the state of Alabama pertaining to the operation of the No. 2 Coke battery at the Gadsden plant. That order required Republic to implement an air pollution control program and requires Republic to pay a penalty of over $250,000 if the control program is not implemented. Further, a daily penalty for future violations of pollution standards is imposed and "is applicable *until the battery is permanently shut down.*" (Source: Republic 1982 10-K p. 10), . . . [Emphasis in original.]

> (4) The *Gadsden plant coke oven was named in 1982*, as a *"cancer hot-spot" producing potentially dangerous pollution*, according to the National Clean Air Coalition (Source: UPI March 10, 1982); . . . [Emphasis added.]

Id. at 29,323. *See* Pet. App. O, at 128a-30a.

The District Court, in evaluating the consent decree under the Tunney Act, recognized these problems:

> there is substantial doubt that Gadsden can be sold and operated as an effective competitor in the market for hot and cold rolled carbon and alloy sheet and strip. . . . The shutting down in 1982 of certain portions of the Gadsden facility, *current problems with air pollution, rejection of a proposal for investment in new equipment* . . . are cited as examples of the problems facing Gadsden.

See Pet. App. I, at 78a-79a (emphasis added).

Despite these conditions, the United States contended that the consent decree's "stringent provisions" insured that a buyer would be found, by a trustee if necessary, and that the purchase terms would enable a buyer to be a viable competitor. *See* 49 Fed. Reg. 13,603, at 13,609 (Apr. 5, 1984). The United States emphasized that the consent decree contained "provisions *not usually found*" in such decrees, which were "designed to achieve prompt divestiture" to induce a buyer to take such a risk. *See* 49 Fed. Reg. 29,288, at 29,316 (July 19, 1984).

Therefore, the District Court held that the decree was in "the public interest" and entered it as a Final Judgment. *See* Pet. App. I, at 106a; JA58. According to the District Court:

> [t]he public interest is to be determined in the context of the anti-trust laws whose fundamental premise is the protection and safeguarding of free competition. The effect on competition of the proposed settlement

> is of paramount importance in the determination which we are required to make.

See id. at 88a.

2. The District Court's Divestiture And Implementing Orders Were Entered Pursuant To And In Furtherance Of The Final Judgment.

Because it was not divested within six months, as required by the Final Judgment, the District Court appointed a trustee to divest the Gadsden plant. *See* Pet. App. J, at 110a. Although LTV objected, on October 8, 1985, the trustee recommended divestiture to the Brenlin Group ("Brenlin"), *see* JA1017, and the United States concurred, *see* Pet. App. Q, at 137a; JA1126-JA1131.

LTV specifically objected to being required to retain and assume environmental liabilities, stating:

> The Brenlin proposal would cause LTV very severe financial hardship. . . .
>
> . . . .
>
> LTV is not required by the Final Judgment to assume any liability to fund, after the Closing, the cost of any corrective action required to be taken with respect to the divested assets under any applicable environmental law or regulation, as provided in the Brenlin proposal.

See JA1028, JA1031. In a November 26, 1985 Affidavit, filed in support of its objections, LTV's then Executive Vice President and Chief Financial Officer, further stated:

> [*T*]*he Brenlin proposal could be read as requiring LTV to pay the cost of corrective actions required to be taken with respect to the divested assets under applicable environmental* and occupational health and safety *laws or regulations*. . . . The sale of the

> Gadsden plant to Brenlin would result in grievous injury to LTV. . . . Additional cash penalties would be incurred that cannot be calculated. *Those penalties, would result from: . . . Costs of post-closing funding for OSHA/Environmental compliance.*

See JA1105-JA1106 (emphasis added). LTV's "best forecast" of the costs for "capital projects for environmental controls" at the Gadsden plant in September 1985 ranged between $18-$21 million including: (1) Water Treatment for Coke Plant ($7-10 million); (2) B.O.F. Precipitator Repairs ($3 million); (3) Hot Strip/Cold Strip Water Treatment ($3 million); (4) No. 3 Battery Rehabilitation ($3 million) and (5) Additional Solid Waste Disposal Area ($2 million). *See* Pet. App. R, at 145a; JA1007.

Following extensive briefing concerning LTV's objections and an evidentiary hearing, the District Court entered a divestiture order on terms recommended by the trustee that required LTV to retain and assume the environmental liabilities of Gadsden upon the divestiture. *See* Pet. App. K, at 113a; JA62-JA65. As the Final Judgment specified,

> prompt and certain divestiture is the essence of this agreement and [LTV has] represented . . . that the divestiture required below can and will be made and that *[LTV] will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions* . . .

See Pet. App. I, at 93a; JA43 (emphasis added). LTV filed a notice of appeal, which was later withdrawn and dismissed. *United States v. LTV Corp.*, No. 85-6222 (D.C. Cir. Feb. 20, 1986) (order dismissing appeal).

Thereafter, Brenlin formed GSSI to own and operate the Gadsden plant. On January 31, 1986, GSSI made a promissory note for $38.5 million to LTV to purchase assets of the Gadsden plant. *See* JA20-JA31. In return, LTV agreed to be bound by

an Asset Purchase Agreement, executed on the same day, that specifically incorporated by reference LTV's obligation under the Final Judgment to retain and assume all liabilities at the Gadsden plant as of the date of closing. *See* JA88. As required, LTV also provided GSSI with an exhibit to the Asset Purchase Agreement to disclose the Gadsden plant's compliance record with environmental laws and regulations since January 1, 1980, which included LTV's "schedule of corrective action," required to be implemented by LTV for "material compliance with current environmental laws," if LTV had retained the plant. *See* JA98. This document, Exhibit V, disclosed that LTV had notice that expenditures of $5.2-$20 million could be needed to correct water pollution control facilities alone. *See* Pet. App. T, at 182a-183a; JA1173.

3. The District Court's Escrow Deposit Order Was Entered To Supervise Enforcement Of the Final Judgment, As Well As To Protect LTV's Creditors During The Pendency Of This Litigation.

On July 17, 1986, LTV filed for reorganization, under 11 U.S.C. § 101 *et seq.*, in the Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The bar date was set as November 25, 1987. *In re Chateaugay Corp.*, Nos. 86B11270 through 86B11334, 86B11402, and 86B11464 (Bankr. S.D.N.Y. July 30, 1987) (order setting bar date). On that date, GSSI filed proofs of claims specifically referencing LTV's obligations under the Final Judgment and the District Court's prior orders concerning the divestiture. *See* JA1188-JA1205.

From January 31, 1986, to February 1, 1991, GSSI paid LTV $37,532,187 on the promissory note (*i.e.*, $9,625,000 principal and $27,907,187 interest). On February 1, 1991, however, GSSI defaulted on a $4,812,500 payment because LTV had failed to retain and assume environmental liabilities required under the Final Judgment. *See* JA32-JA33. On

February 4, 1991, LTV and its related companies initiated an adversary proceeding in the Bankruptcy Court to recover the $31,293,281 balance then due on the note, plus default interest. *See* JA13-JA19.

On March 15, 1991, GSSI moved in the District Court for the Southern District of New York to withdraw the reference and transfer venue to the District Court. *See* JA128-JA159. GSSI also moved, pursuant to Federal Rule of Civil Procedure 67, voluntarily to deposit $31,293,281, *i.e.*, the unpaid principal and default and accrued interest on the note as of the date of default, into the registry of the district court determined to have jurisdiction over the dispute. *See id.* On March 18, 1991, GSSI also filed its answer asserting recoupment, among other defenses, because of LTV's failure to retain and assume environmental liabilities at the Gadsden plant, as required by the Final Judgment. *See* JA165.

On April 1, 1991, the State of Alabama, through its Attorney General, James H. Evans, filed a motion to intervene, or in the alternative to appear as an *amicus curiae*, in the proceeding to withdraw the reference, *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1826 (S.D.N.Y. 1991). The State of Alabama argued, under its *parens patriae* authority and this Court's unanimous decision in *California v. American Stores, Co.*, 495 U.S. 271, 281-82 (1990), that a state's standing to seek a post-acquisition divestiture under the federal antitrust laws inherently conveys the requisite standing to enforce the benefits conveyed by that divestiture. *Id.* at 296. The State of Alabama further asserted that it

> like the United States has an interest in a competitive steel industry and the creation of a viable competitor in that market, but *Alabama has a more compelling and direct interest in maintaining GSSI as a viable ongoing competitor that is in compliance with Alabama's environmental laws and regulations.*

> Alabama also is without question a primary and direct beneficiary of the Final Judgment, which sets forth the circumstances under which LTV may be required to assume all liabilities of the Gadsden plant, including environmental. . . . *Alabama has a direct interest in the divestiture of the Gadsden plant that preexists and is separate and apart from GSSI's interests, although it also has a related interest in having LTV indemnify GSSI for certain environmental liabilities to the extent such indemnification conveys competitive and environmental benefits to the citizens of Alabama.*

See Pet. App. AA, at 208a. The State of Alabama also filed a Motion to Intervene before the District Court to enforce its rights under the Final Judgment.

On May 3, 1991, the District Court for the Southern District of New York withdrew the reference from the Bankruptcy Court and transferred venue to the District Court below, stating:

> In the *interest of justice and in deference to its retention of jurisdiction* . . . this proceeding is respectfully transferred . . . to the United States District Court for the District of Columbia *for such further proceedings as that court sees fit* . . . .

See Pet. App. H at 65a; JA172-JA173 (emphasis added). That district court also dismissed GSSI's Rule 67 motion, without prejudice to its being refiled before the District Court below. *Id.* On May 13, 1991, GSSI refiled its motion.

After briefing concluded, the District Court scheduled a June 14, 1991, oral argument. The transcript reflects that the District Court carefully weighed its duties to supervise enforcement of the Final Judgment and to protect LTV's creditors

during the pendency of this litigation[2] against LTV's contractual right to receive a higher interest rate if there was a default on the note. *See* JA225-JA243. The District Court decided to accept GSSI's voluntary and full payment of the disputed monies into escrow and terminated the operation of the default rate of interest, on the condition that the full deposit was made up to and including the date of deposit. *See* Pet. App. D, at 43a; JA260-JA261.

4. The District Court's Order Denying Summary Judgment And Its Recoupment Order Enforced LTV's Duties Under The Final Judgment, Divestiture, And Implementing Orders.

On May 24, 1991, GSSI filed a motion to enforce the District Court's prior orders and in opposition to LTV's May 3, 1991 motion for summary judgment.[3] *See* JA180. As the transcript of the June 14, 1991 oral argument reflects, the District Court reminded LTV that it had notice of GSSI's claims for and amounts required for environmental compliance, which was the basis for one of its objections to the divestiture to Brenlin. *See* Pet. App. BB at 213a; JA244-JA247. Since this objection was made, considered, ruled on, and appealed in the divestiture proceedings in 1985-1986, the District Court denied LTV's motion for summary judgment and set a hearing solely to determine whether the amount GSSI sought by recoupment

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[2] *See LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. June 17, 1991) (order denying motion of Steel Committee for leave to intervene but accepting leave to file as *amicus curiae*). *See also* JA226.

[3] On May 23, 1991, the State of Alabama also refiled its motion to intervene or, in the alternative, file as an *amicus curiae*. *See* JA175-JA177. The District Court denied the State of Alabama's motion to intervene. *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. June 5, 1991) (order denying motion of State of Alabama for leave to intervene). Subsequently, on August 26, 1991, however, the District Court allowed the State of Alabama to file as an *amicus curiae*. *See* JA275-JA276.

had, in fact, been spent to discharge LTV's environmental liabilities, under the Final Judgment and divesture order. *See* Pet. App. E, at 57a; JA270-JA271.

After an evidentiary hearing on August 26-27, 1991, *see* JA422-JA832, and several months of additional briefing by the parties, the District Court issued Findings of Fact and Conclusions of Law reaffirming that LTV was required to retain and assume environmental liabilities at the Gadsden plant. *See* Pet. App. B, at 28a; JA385-JA399. Because GSSI already had paid or incurred expense for correcting environmental violations which arose directly or indirectly out of the conduct of business at the Gadsden plant prior to January 31, 1986, the District Court held GSSI was entitled to recoup the following amounts from the escrow deposit: (1) $18,085,438 for correcting environmental violations that arose directly or indirectly out of the conduct of business at the Gadsden plant prior to January 31, 1986 (and $2,371,353 of interest on that amount from July 31, 1991), and (2) $10,620,741 for authorized and anticipated, but not yet fully incurred expenses. *See* Pet. App. B, at 33a, 39a; JA391-JA398. *Compare* Pet. App. Z, at 204a. As a predicate to that determination, the District Court held, in accord with its July 1, 1991 Order, that "LTV had timely notice, written and otherwise, of GSSI's indemnification claims." *See* Pet. App. B, at 39a; JA398.

5. The Court Of Appeals' Decision Modified The Final Judgment.

The Court of Appeals concluded on *de novo* review that under Section 9.3 of the Asset Purchase Agreement

> GSSI failed to provide prompt notice to LTV, as explicitly required . . . *of the claims for which GSSI planned to seek indemnification* under the Asset Agreement and thereby give LTV an opportunity to challenge or defend against any such claims, GSSI is

> barred from asserting its rights to indemnification under the Asset Agreement.

See Pet. App. A, at 2a (emphasis added). The Court of Appeals ordered immediate payment to LTV of the entire escrow deposit fund that had been subject to the continuing jurisdiction of the District Court,

> *plus* the difference between the earnings of the escrow fund and the amount of interest that would have been earned at an annual rate of 18-3/4% on $31,293,000 between June 21, 1991 and the date of judgment on remand.

See Pet. App. A, at 27a (emphasis added).

On July 28, 1992, GSSI's petition for rehearing and suggestion for rehearing en banc was denied. *See* Pet. App. M, at 120a. On August 4, 1992, the Court of Appeals issued its mandate implementing the June 12, 1992 decision. On August 6, 1992, the District Court entered a Final Judgment complying with the mandate, but reserved jurisdiction until all remaining matters under the Final Judgment were concluded. *See* Pet. App. F, at 60a. By its terms, the Final Judgment does not expire, however, until August 2, 1994. *See* Pet. App. I, at 106a; JA58.

On September 8, 1992, LTV filed a partial satisfaction of judgment with the District Court to verify that the entire escrow deposit had been paid by GSSI, together with an additional money judgment of $4,959,877.64. A money judgment of an additional $100,000.00 is still owed and remains due LTV under the August 4, 1992 mandate so that a viable case and controversy survives for this Court's review and redress.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit recently stated in a different case involving LTV, "[t]his appeal presents important issues at the intersection of bankruptcy and environmental law." *In re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir. 1991). In the case before this Court, these laws now meet another crossroad — with the antitrust laws. This Court held many years ago that the antitrust laws were "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). When Congress enacted the Bankruptcy Code, it made specific amendments to numerous statutes to enable a debtor to have "a fresh start." *See* Bankruptcy Reform Act of 1978, P.L. 95-598, §§ 201-401, 92 Stat. 2549, 2657-82 (1978). Neither Section 7 of the Clayton Act nor the Tunney Act, however, were among the laws amended. Thus, Congress did not subjugate the antitrust laws to the bankruptcy code. Each of these laws fulfills distinct and different public policy objectives. The bankruptcy laws provide a safety net for the failures of the market. The antitrust laws exist to promote an economic system where the market rewards superior business acumen and risk takers by allowing consumers to pick the winners and losers.

In 1984, LTV promised the public that it would promptly divest the Gadsden plant to ameliorate the anti-competitive effects of the Republic acquisition. Because LTV did not keep that promise, the District Court was required to intervene and appoint a trustee to insure that it was kept— under the terms that LTV had agreed to and represented during the Tunney Act proceedings were "in the public interest." Brenlin (GSSI) was selected by the District Court's trustee to fulfill the need to interject new vigorous competition into a mature and laggard market. GSSI promised that it would make the Gadsden plant a "viable competitor;" in return, GSSI became the direct and

intended beneficiary of a bargain LTV made with the public. GSSI became a "viable competitor," but that viability will be significantly impaired if LTV is not required to live up to its promise to retain and assume environmental liabilities at the Gadsden plant. In this action, District Court was required to act again to enforce LTV's promise. By granting GSSI recoupment for environmental claims, the District Court promoted the objectives of the environmental and antitrust laws, without harm to the bankruptcy code. *Accord In re Chateaugay Corporation*, 944 F.2d at 1002. ("[O]f course, the comprehensive nature of the bankruptcy statute does not relieve us of the obligation to construe its terms, nor may we resolve all issues of . . . construction in favor of the 'fresh start' objective, regardless of the terms Congress has chosen to express its will.")

This Court should issue a writ of certiorari to review the Court of Appeals' *de facto* modification of the Final Judgment without following the procedures and substantive requirements all other courts of this land are expected to follow.

I. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY WHEN IT MODIFIED *DE FACTO* THE FINAL JUDGMENT WITHOUT THE PARTICIPATION OF THE UNITED STATES AND THE STATE OF ALABAMA AND WITHOUT COMPLIANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 60(B)

The Court of Appeals' issuance of the mandate to enforce its June 12, 1992 decision, ordering immediate payment of the entire escrow deposit to LTV without even facial compliance with Federal Rule of Civil Procedure 60(b) exceeded the proper exercise of its jurisdiction, as that action modified *de facto* the Final Judgment as well as the District Court's divestiture and implementing orders, entered to enforce the Final Judgment.

Last term, in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), this Court ruled, even under its "flexible"

standard, that the modification of a consent decree under Rule 60(b) is appropriate only where

> *a party seeking modification of [the] decree . . . establish[es] that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.*

Id. at 765 (emphasis added).

The Court of Appeals, however, simply ignored these requirements. There was no change, either in fact or law, that could have been cited on the public record as a credible justification to support the Court of Appeals' mandate, other than the consequences of LTV's voluntary decision in 1986 to seek reorganization. In 1984, however, LTV waived the ability to seek a subsequent modification based on "hardship or difficulty." *See* Pet. App. I, at 93a; JA 43. In return, LTV received the immediate financial and competitive benefits conveyed by the merger with Republic. *See* Pet. App. S, at 152a; JA1089.

At a minimum, the views of the United States, a party to the Final Judgment, and the State of Alabama, a beneficiary thereof, should have been solicited. It is not surprising that the United States did not intervene in the adversary action. *See* Pet. App. Y, at 203a. It was established in the 1984 Tunney Act proceedings and the 1985-1986 divestiture proceedings *that LTV had* and was required to retain environmental liabilities at the Gadsden plant. The United States Environmental Protection Agency ("EPA"), in documents introduced below, took the position in 1987 that violations at the Coke Plant and Basic Oxygen Furnace ("BOF") facilities for which GSSI was required to make environmental corrections, were not new or unforeseen by LTV, as these violations had caused the Gadsden plant to be "carried [by EPA] as a significant violator since October 1984." *See* Pet. App. U, at 184a; JA1206-JA1209. *See also* Pet. App. V, at 191a; JA1180-JA1187.

The District Court permitted the State of Alabama to file as an amicus[4] and allowed the admission of abbreviated affidavits from the state environmental enforcement agency officials, prepared to supplement one of the State of Alabama's amicus filings. *see* Pet. App. W, at 198a; Pet. App. X at 199a. Before the Court of Appeals issued its mandate, these key witnesses should have been afforded the opportunity to provide their views regarding the basis of the District Court's finding that LTV had the requisite actual notice of the claims at issue and whether there were changed circumstances to support a modification.

The Court of Appeals' *de novo* review found "nothing in the record to suggest that GSSI *ever informed* LTV, prior to defaulting on the Note, that *it intended* to hold LTV *liable for these environmental expenses*." *See* Pet. App. A, at 23a (emphasis added). That is not what is required under Section 9.3, however, which provides that:

> in the event of any *claims* under Section 9.1 or 9.2 for indemnification, the Claimant shall advise the Indemnitor in writing of the *amount and circumstance surrounding* said *claim*.

See JA108-JA109 (emphasis added).

Before deciding to substitute its judgment for that of the supervising District Court, the Court of Appeals should have been sure its *de novo* review was correct. Under Section 9.3 the proper analysis is: what are GSSI's "claims"; what are the "amounts and the circumstances surrounding those claims;" and then, was there written notice of these?

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[4] The State of Alabama attempted to intervene below, *see* JA175-JA179, but was informed by the United States that it would oppose the State of Alabama's status as an intervenor, but would not oppose its participation, if it was limited to an *amicus curiae*. The State of Alabama agreed at that juncture to accommodate the United States to avoid a battle over standing.

To ascertain the meaning of "claims" this Court need look no further than LTV's own definition:

> *a claim under an environmental statute comes into existence when the debtor acts* so as to give rise to a predicate for liability under the statute . . . it is the *debtor's act alone that creates a "claim."*

Brief of Defendants-Appellees and Cross-Appellants the LTV Corporation, LTV Steel Company, Inc. and all affiliated Debtors at 15 (emphasis added). *In re Chateaugay Corporation*, No. 90-5024 (2d Cir.).

All of GSSI's "claims" came into existence when LTV "act[ed] so as to give rise to a predicate for liability under the [environmental] statute(s)," *i.e.*, the "claims" came into existence when LTV owned the Gadsden plant and failed to take action to bring the Coke Plant, BOF Melt Shop and Wastewater Treatment Plant into "compliance with the applicable regulatory standard on a continuous and day-to-day basis." *See* Pet. App. B, at 32a. Therefore, LTV had actual knowledge of GSSI's "claims," *see* Pet. App. P, at 132a; Pet. App. S, at 152a, the amount of claims, *see* Pet. App. R, at 14a; Pet. App. T, at 170a, and the circumstances surrounding their existence, *id.* In addition, LTV was given written notice of GSSI's "[intention] to hold LTV liable" for these *claims* prior to the default on the note during the divestiture proceedings and by the filing of GSSI's proofs of claims, which referenced the Final Judgment and orders, entered by the District Court in the Tunney Act and divestiture proceedings. *See* JA1188-JA1205. Therefore, the District Court's finding and conclusion with regard to notice were not clearly erroneous nor an abuse of its discretion.

Justice O'Connor's concurring opinion in *Rufo* singles out one of the most compelling reasons why this Court should grant certiorari in the case at bar—the discretion to be accorded a district court that has spent a number of years "supervising the

implementation of this decree." *Rufo*, 112 S. Ct. at 765. As Justice O'Connor stated:

> A court may modify a final judgment, such as the judgment embodied in the consent decree at issue, where the court finds that "it is no longer equitable that the judgment should have prospective application." Fed. Rule Civ. Proc. 60(b)(5). Determining *what is "equitable"* is necessarily a task that *entails substantial discretion*, particularly in a case like this one, where the District Court must make complex decisions requiring the sensitive balancing of a host of factors. *As a result, an appellate court should examine primarily the method in which the District Court exercises its discretion, not the substantive outcome the District Court reaches. If the District Court takes into account the relevant considerations (all of which are not likely to suggest the same result), and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance. Cf. Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S. Ct. 1463, 1469, 36 L.Ed.2d 1510 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

Id. (emphasis added). *See also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (substantial deference is owed to "the trial judge's years of experience with the problem at hand").

A review of the seven-year history of the District Court's supervision and oversight of the Final Judgment reveals repeated efforts by LTV at every juncture to avoid its obligations. The record clearly reflects that the District Court exercised "substantial discretion" in "[taking] into account the

relevant considerations [concerning LTV's consent decree obligations to retain and assume environmental liabilities and GSSI's claims] and accommodate[d] them in a reasonable way," in effect, by declining to modify the Final Judgment, and granting GSSI recoupment. *Accord Anderson v. City of Bessemer City*, 470 U.S. 564, 573-575 (1985) ("If the district court's account of the evidence is plausible in light of the *record viewed in its entirety*, the Court of Appeals *may not* reverse") (emphasis added).

Contrary to this Court's clear precedent, the Court of Appeals disregarded the District Court's superior knowledge, gained as the trier of fact, of: the parties; the consent decree's requirements; the amount and circumstances surrounding the claims at issue; and, the sufficiency of notice under Section 9.3.

This Court should exercise its supervisory powers and grant GSSI's petition for a writ of certiorari to reverse the Court of Appeals and reinstate the District Court's December 5, 1991, order enforcing terms of the Final Judgment, divestiture and implementing orders properly issued thereunder.

II. THE COURT OF APPEALS IGNORED THE EQUITABLE AUTHORITY CONVEYED BY THE DISTRICT COURT'S JURISDICTION AND MISAPPLIED THE RULES ENABLING ACT, 28 U.S.C. § 2072(B) (1988), TO IMPOSE AN UNCONSTITUTIONAL, UNDULY HARSH AND UNJUST BURDEN ON GSSI, WHICH WILL IMPAIR THE FUTURE UTILITY OF FEDERAL RULE OF CIVIL PROCEDURE 67.

The District Court's June 21, 1991 escrow deposit order held that GSSI's obligation to LTV on the note was

> *satisfied and paid in full*, upon GSSI's deposit in escrow . . . the amount of $31,293,000.00 together

> with interest at the rate of 18-3/4 percent from February 1, 1991 through the date of the entry of this Order.

See Pet. App. D, at 44a (emphasis added). The District Court also ordered that the accrual of any additional default interest at the contract rate of 18-3/4% terminated upon the deposit of these disputed monies in escrow and market interest took its place. *Id.*

The Court of Appeals conceded that "[t]he decision whether to allow a Rule 67 deposit generally lies within the discretion of the district court." *See* Pet. App. A, at 25a (citations omitted). Nevertheless, it held "that Rule 67, like all of the Federal Rules of Civil Procedure, 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b) (1988)." *Id.*[5] On that basis, the Court of Appeals opined that

> the district court [did not have] authority, under Rule 67, to alter the substantive contractual right of LTV to receive, upon [GSSI's] default, an 18-3/4% annual [default] interest rate on the principal amount still owing under the Note. The district court abused its discretion when it effectively altered the terms of the contract by substituting the market rate of interest available in the escrow account for the rate to which the parties had agreed in the Note.

Id. at 26a.

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[5] This Court also should issue a writ of certiorari to endorse the Fifth Circuit's practice of declining to review the effect of the Rules Enabling Act in cases where it was not raised before or decided by the District Court, as was the case here. *See Thomas v. Capital Sec. Servs. Inc.*, 836 F.2d 866, 884 n.25 (5th Cir. 1988) (en banc). This issue was raised by LTV for the first time on April 6, 1992 in its reply brief at 13, at a time when GSSI had no further right to respond in writing to the interjection of this new issue into the proceedings.

Declaring that "[s]ome risks simply do not pay off," the Court of Appeals remanded the case and directed that LTV be paid the full amount held in the escrow deposit "plus the difference between the earnings of the escrow fund and the amount of interest that would have been earned at an annual rate of 18-¾% on $31,293,000 between June 21, 1991 and the date of judgement on remand." *Id.* at 27a. The Court of Appeals' analysis was erroneous both as to the source of the District Court's power to enter that order and the effect of the Rules Enabling Act on a deposit proffered under Rule 67.

A. The District Court's Power to Accept the Escrow Deposit Was Not Derived From Rule 67.

The Court of Appeals misconstrued the District Court's power to accept the escrow deposit, which was derived from equity powers attendant to its continuing statutory jurisdiction under 15 U.S.C. § 18, over the Final Judgment, and residual power under 11 U.S.C. § 105(a), to protect and preserve the potential assets of the debtor.[6] As the transcript of the June 14,

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[6] The Court of Appeals implies in dicta in the last paragraph of its decision that GSSI should have sought "relief as a creditor in bankruptcy court." *See* Pet. App. A, at 27a. LTV did not challenge the May 3, 1991 Order of the Southern District of New York to withdraw the reference. *See* JA419-JA420. Therefore, it was settled as a matter of law that GSSI followed the proper procedure for seeking an adjudication before the District Court that entered the Final Judgment and was determined to have continuing jurisdiction over the parties and all disputes arising thereunder. Therefore, the Court of Appeals exceeded its power by improperly considering an issue never raised on appeal and its consequential misperception of the proper scope of the District Court's jurisdiction.

If LTV did not in fact have the requisite notice, as the Court of Appeals held, however, it would not have been able to seek relief in the Bankruptcy Court either. In this *dicta*, the Court of Appeals revealed the motive behind its defective "*de novo*" analysis. The Court of Appeals decided *sua sponte* to modify the Final Judgment to allow LTV to renege on its promise to GSSI because of LTV's bankruptcy. Since the terms of the Final Judgment would not permit that, the Court of Appeals took the matter into its own hands.

1991 oral argument reflects, the District Court weighed its equitable authority to further jurisdictional objectives appropriate to each statute before deciding to enter the order. *See* JA225-JA259.

By accepting GSSI's voluntary payment of over $31 million of disputed funds into escrow, the District Court enabled the parties to adjudicate their rights under the Final Judgment while the disputed monies were invested and continued to accrue interest at the prevailing market rate for the benefit of the ultimate recipient. The deposit also secured monies from which LTV's pre-existing duty to retain and assume environmental liabilities at the Gadsden plant could be met. *See* JA237. In addition, even though LTV waived its ability to seek modification of the Final Judgment on the basis of subsequent financial "hardship or difficulty," the District Court was not precluded from exercising its equitable power under 11 U.S.C. § 105(a) to protect the interests of LTV's creditors in the disputed funds. In the event LTV could have demonstrated at trial that it was not required to retain and assume the specific environmental liabilities at the Gadsden plant that GSSI claimed, or could have shown that it had already fulfilled those obligations prior to divestiture, the deposited monies protected the interests of those creditors. LTV, however, failed to meet its burden of proof and persuasion as to each at trial.

B. The District Court's Escrow Deposit Order Did Not Impair LTV's Contractual Rights.

The Court of Appeals misconstrued the effect of the Rules Enabling Act on the District Court's June 21, 1991 escrow deposit order. That Act clarifies that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1988). The District Court, however, exercised its power in complete accord with the Rules Enabling Act because LTV's contractual right to receive default interest was not impaired. LTV received the default rate from

the date of default until and through the date deposit was made in escrow for the full amount owed on that date under the contractual provisions on the note. Thus, GSSI's debt on the note was paid and satisfied in full. This determinative fact was entirely ignored, resulting in the Court of Appeals' erroneous application of the Rules Enabling Act.

C. This Court Should Not Allow a Future Litigant That Makes a Deposit Under Rule 67 To Be Placed At Risk Retroactively.

Rule 67 was enacted and amended to allow parties to adjudicate rights over disputed funds without accruing unnecessary liability. Rule 67 plainly states:

> [I]n an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money . . . a party upon notice to every other party, and by leave of court, may deposit with the court all or part of such sum or thing, whether or not that party claims all or any part of the sum . . . . The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

Fed. R. Civ. P. 67.

In fact, Rule 67 was amended specifically to accommodate

> situations in which a litigant may wish to be relieved of responsibility for a sum or thing, but continue to claim an interest in all or part of it. In these cases the deposit-in-court procedure should be available; in addition to the advantages to the party making the deposit, the procedure gives other litigants assurance that any judgment will be collectable. The amendment is intended to accomplish that.

Fed. R. Civ. P. 67 advisory committee's note, 1983 amendment *quoted in* 7 James W. Moore *et al.*, *Federal Practice* ¶ 67.01[6] (2d ed. 1992).

The phrase "whether or not that party claims all or any part of such sum or thing" was added to Rule 67 in 1983. *Id.* Prior to 1983, some courts construed Rule 67 "to permit deposit only when the party making it claims no interest in the fund or thing deposited." *Id.*

This Court of Appeals is the *only federal court* that has held the termination of the accrual of default interest upon deposit to be an abuse of discretion, even though it allowed that "very few cases construing Rule 67" exist. *See* Pet. App. A, at 25a. For this reason alone, GSSI's petitioner for writ of certiorari should be granted. As a practical matter, what litigant would wish to "risk" making a deposit under Rule 67 in the future, in light of the price paid in this case, *i.e.*, over $5 million or $400,000 for each month this matter was pending?

The retroactive application of the Court of Appeals' decision exceeds the constitutional bounds of reasonableness. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5, 437 (1982) (unreasonable requirements may infringe on a litigant's due process right to a hearing). *Cf. Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 882-83 n.23 (5th Cir. 1988) (en banc) ("any type of sanction, monetary or otherwise, should not result in preclusion of access to the courts"). Moreover, it is particularly offensive to GSSI's due process rights were impaired since the June 21, 1991 escrow deposit order, by its terms, was not a final order under 28 U.S.C. § 1291. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). *See also Thomas*, 836 F.2d at 882-83 n.23.[7]

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[7] Under these circumstances, at a minimum, GSSI should be able to rely on the District Court's ruling to terminate the operation of default interest as of that date.

This mandate was unduly harsh and unnecessarily punitive. GSSI not only lost the use of the deposited monies during the escrow deposit, but continued to accrue liability, while LTV's interests were protected. What litigant would ever risk using Rule 67 again? *Cf. Southern Constr. Co. v. Pickard,* 371 U.S. 57 (1962) (certiorari was granted "to consider the applicability of [a Federal] Rule [of Civil Procedure] in these unusual circumstances").

Finally, there is no compelling reason in the record, nor was one offered by the Court of Appeals, as to why the District Court should not have retained jurisdiction over the escrow deposit pending this Court's review of GSSI's writ of certiorari. Thus, the Court of Appeals' mandate appears to have been issued to impair GSSI's ability to seek this Court's review and redress for its clear circumvention of Rule 60(b) and this Court's precedent in *Rufo, Lemon, Hutto,* and *Anderson.*

Rule 67 was enacted to facilitate the orderly resolution of disputes over money by providing a "safe harbor" for such funds during the storm of litigation so that both parties' interests in the funds were protected. The Court of Appeals' decision, however, has thrown litigants back into a sea of unknown and unnecessary risk. This Court should grant certiorari to reopen this "safe harbor" and redress this injustice.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review and reverse this decision and mandate of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 4, 1992 Decided June 12, 1992

No. 92-7001

The LTV CORPORATION, *et al.*, *APPELLANTS*

v.

GULF STATES STEEL, INC. OF ALABAMA, *APPELLEE*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 91-01072)

Guy Miller Struve, with whom *Karen E. Wagner* and *Jerome G. Snider* were on the brief, for appellants.

Richard T. Cunningham, with whom *Susan G. Braden* and *Betty Southard Murphy* were on the brief, for appellee.

James G. Greilsheimer was on the brief for *amicus curiae* Official Committees of Unsecured Creditors of LTV Corporation, et al., urging that the judgment of the District Court be reversed.

Marc Givhan was on the brief for *amicus curiae* State of Alabama.

Before WALD, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Appellants LTV Corporation, LTV Steel Company, Inc. and Gulf States Steel Corp. (collectively "LTV") appeal from an order of the district court award-

ing over $31 million to appellee Gulf States Steel, Inc. of Alabama ("GSSI") as recoupment for expenses incurred in remedying certain environmental violations at a steel mill in Gadsden, Alabama.[1] GSSI purchased the Gadsden plant on January 31, 1986 (the "Closing Date") pursuant to an Agreement of Purchase and Sale of Assets ("Asset Agreement"). The district court interpreted the Asset Agreement to mean that LTV was obligated to pay for all corrective actions to bring the Gadsden plant into compliance with environmental laws to the extent that the conditions to be remedied arose directly or indirectly out of the conduct of the business on or before the Closing Date. After a two-day evidentiary hearing, the court concluded that GSSI was entitled to recoup $31,077,532 in expenses.

Because we conclude that GSSI failed to provide prompt notice to LTV, as explicitly required by the Asset Agreement, of the claims for which GSSI planned to seek indemnification under the Asset Agreement and thereby give LTV an opportunity to challenge or defend against any such claims, GSSI is barred from asserting its rights to indemnification under the Asset Agreement. We therefore reverse.

I. BACKGROUND

A. *The Consent Decree*

When LTV agreed to purchase Republic Steel Corp. ("Republic") in September 1983, the Justice Department filed a complaint seeking to enjoin the merger, charging that it would substantially lessen competition in critical parts of the steel industry and tend to create a monopoly in violation of the antitrust laws. A consent decree was signed and approved in August 1984, *see United States v. LTV Corp.*, 1984-2 Trade

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[1] The Gadsden plant is an "integrated steel mill" — that is, it contains facilities for cokemaking, ironmaking, steelmaking, rolling and finishing processes.

Cas. (CCH) ¶66,133, at 66,334 (1984) ("*Final Judgment*"), *appeal dismissed*, 746 F.2d 51 (D.C. Cir. 1984), according to which LTV agreed to divest itself of Republic's steel plant at Gadsden, Alabama. Specifically, the parties agreed that the

> [d]ivestiture of Gadsden shall be accomplished in such a way as to ensure that, as of the time of divestiture, it can reasonably be anticipated that Gadsden can and will be operated by the purchaser or purchasers as a viable, ongoing business engaged in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel made from slabs produced at Gadsden or elsewhere.

Id. at 66,334.

LTV and the Justice Department also agreed that, should it prove necessary to appoint a trustee to effect the divestiture, the trustee

> shall have the power to require the defendants to divest assets only, retain and assuming all liabilities of Gadsden . . . upon [its] divestiture. Defendants shall not object to a sale by the trustee on any grounds other than malfeasance, provided, however, that if the buyer chooses to purchase any inventory or semi-finished or finished steel mill products, coke or raw materials, defendants shall have a right to object. . . .

Id. at 66,345.

B. The Sale

As expected, the district court appointed a trustee in December 1984 to effect the divestiture of the Gadsden plant. *See United States v. LTV Corp.*, No. 84-0884 (D.D.C. Dec. 10, 1984). In April 1985, the trustee identified the Brenlin Group ("Brenlin"), a Ohio-based, private holding company, as a possible purchaser. Brenlin submitted a proposed Asset Purchase Agreement as well as a Business Plan to the trustee, and in October 1985, the trustee recommended that the Gadsden plant

be divested to Brenlin, on the terms set forth in a revised Asset Purchase Agreement dated September 23, 1985.

The Justice Department submitted a letter to the court in which it stated that it had no object to and, indeed, supported the sale of the Gadsden plant to Brenlin pursuant to the proposed asset agreement. *See* Letter from J. Robert Kramer, Att'y, Antitrust Division, to Judge Pratt (Nov. 27, 1985). LTV objected to the sale, but after full briefing and oral argument, the district court ordered that the Gadsden plant be sold to the Brenlin Group on the basis of the proposed agreement with "such other modifications as may be agreed to by LTV and Brenlin and approved by the Trustee, and, if material to the viability of Gadsden, by the Department of Justice." *United States v. LTV Corp.*, No. 84-0884 (D.D.C. Dec. 17, 1985) ("*December 17 Order*") para. 3(f).

After denial of its motion for expedited appeal of the *December 17 Order* on January 7, 1986, LTV sought to enjoin the sale by seeking a temporary restraining order. Subsequently, the court convened another hearing, the trustee intervened, and LTV finally withdrew its motion on January 30, 1986. *See United States v. LTV Corp.*, No. 84-0884 (D.D.C. Jan. 30, 1986). On the next day, LTV agreed to sell the plant to GSSI, a company formed by Brenlin to own and operate the Gadsden plant.

The final version of the Asset Agreement signed on January 31, 1986 included the following provisions:

> 9.1 *Indemnification by LTV.*
>
> (a) From and after the Closing Date, but subject to the conditions and limitations set forth in this Agreement, LTV shall defend, indemnify and save [GSSI] harmless from and against any and all loss, cost, damage or expense (including attorneys' fees) whatsoever resulting from or arising out of (i) any breach of any covenant, obligation or warranty or misrepresentation of LTV contained herein,

(ii) any liability or obligation arising directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability. . . .

. . . .

9.2 *Indemnification by [GSSI].* From and after the Closing Date, but subject to the conditions and limitations set forth in this Agreement, [GSSI] shall defend, indemnify and save LTV harmless from and against any and all loss, cost, damage or expense (including attorneys' fees) whatsoever resulting from or arising out of (i) any breach of any covenant or obligation of [GSSI] contained herein, (ii) the Assets or [GSSI]'s use thereof after the Closing Date, . . . and (iv) the conduct of the Business after the Closing Date.

9.3 *Claims.*

(a) In the event [GSSI] or LTV (the "Claimant") desires to make a claim against the other (the "Indemnitor") under Section 9.1 or 9.2, the Claimant shall give prompt notice to the Indemnitor of the institution of any actions, suits or proceedings and demands at any time instituted against or made upon Claimant in connection with which the Claimant would claim indemnification under Section 9.1 or 9.2 and Claimant shall, at the time of giving such notice, if the Indemnitor shall agree that it would have responsibility to indemnify under this Section 9.3, give the Indemnitor full authority to defend, adjust, compromise or settle the action, suit, proceeding or demand of which such notice shall have been given, in the name of the Claimant or otherwise as the Indemnitor shall elect. In the event of any claims under Section 9.1 or 9.2 for indemnification, the Claimant shall advise the Indemnitor in writing of the amount and circumstances surrounding said claim. With respect to liquidated claims, if within thirty days the Indemnitor has not contested said claim in writing, the Indemnitor

> will pay the full amount thereof in cash within ten days after the expiration of such period. . . .

Id. §§ 9.1, 9.2, 9.3. The parties agreed that the Asset Agreement would be governed by Ohio law. *Id.* § 13.9.

LTV agreed to accept a $38.5 million unsecured promissory note payable over ten years at an interest rate of 16-3/4% per year. The note provided further than an additional 2% would be added to the interest in the event of default. *See* Promissory Note (Jan. 31, 1986) ("Note") preamble. From August 1, 1986 until February 1, 1991, GSSI made regular payments on the Note, with principal and interest payments totalling over $37 million. As of February 1, 1991, GSSI still owed $31,293,000 under the Note.

C. The Proceedings Below

GSSI refused to make any more payments on February 1, 1991, claiming that LTV had failed to comply with the Asset Agreement by refusing to indemnity GSSI for remedial actions taken to correct environmental conditions at the Gadsden plant. LTV considered GSSI to be in default under the Note and brought an adversary proceeding to recover the full amount ($31,293,000, with interest accruing from February 1, 1991 at a rate of 18-3/4%) in the bankruptcy court in the Southern District of New York, where it had been in voluntary reorganization since July 1986. Judge Stanton of the district court for the Southern District of New York granted GSSI's motion to withdraw the reference to the bankruptcy court and transferred the case to the district court below. *LTV Corp. v. Gulf States Steel, Inc.*, 91 Civ. 1826, slip op. at 1-2 (S.D.N.Y. May 3, 1991).

1. Deposit Order

GSSI filed a motion to deposit the outstanding balance on the Note in an escrow account pending resolution of the disputed issues. GSSI's motion was based on Rule 67, according to which a party, in any action for a sum of money, "may deposit

with the court all or any part of such sum or thing. . . in an interest-bearing account or invested in an interest-bearing instrument approved by the court." Fed. R. Civ. P. 67. LTV objected to this request, arguing that the market rate of interest available from an escrow account was insufficient; according to LTV, it was entitled to the default rate (18-3/4%) under the Note.

After extensive briefing and oral argument on June 14, 1991, the district court granted the motion and ordered that GSSI deposit the outstanding amount owing on the Note into an escrow account. *See* Transcript (D.D.C. June 14, 1991) at 19. In a subsequent order, the district court stated that the deposit of the $31,293,000 (plus 18-3/4% between February 1 and June 21, 1991) in the escrow account would satisfy any remaining obligation of GSSI to LTV under the Note. *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. June 21, 1991) ("*Deposit Order*").

2. *LTV's Motion for Summary Judgment*

In addition to the motion to deposit monies, the district court considered LTV's motion for summary judgment. According to LTV, GSSI had failed to allege that any of the costs it sought to recoup arose from operational events occurring prior to the Closing Date. On July 1, 1991, the district court denied LTV's motion for summary judgment. The court ruled that "[i]ssues of material fact exist as to which, if any, of the corrective actions necessary to bring the Gadsden plant into compliance with environmental law arose 'directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability. . . .'" *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. July 1, 1991) at 2 (quoting from section 9.1(a)(ii) of the Asset Agreement). The court scheduled an evidentiary hearing for August 26 and 27, 1991.

GSSI filed a motion in limine to exclude the introduction in the hearing of extrinsic evidence relating to the meaning of the indemnity clause. The district court granted GSSI's motion. *See LTV Corp. v. Gulf States Steel, Inc.*, No.91-1072 (D.D.C. Aug. 22, 1991).

3. Findings of Fact and Conclusions of Law

After the evidentiary hearing on August 26 and 27, 1991, the parties submitted proposed findings of fact and conclusions of law. The district court adopted, in the main, the proposed findings and conclusions of GSSI. First, the court concluded that "LTV had timely notice, written and otherwise, of GSSI's indemnification claims." *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. Dec. 5, 1991) ("*Findings and Conclusions*") at 14. Second, it found that "[f]rom January 31, 1986 to July 31, 1991, in the normal course of business, GSSI had made authorized expenditures of approximately $130 million for capital improvements, including $18,085,438 in correcting environmental violations that arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986." *Id.* at 6-7. Interest on this amount, owing since July 31, 1991, was calculated to be $2,371,353. *Id.* at 7.

Third, the district court concluded that "expenditures in the amount of $10,620,741 have been authorized [by GSSI's board of directors] and are anticipated, but not yet fully incurred, for correcting environmental violations which arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986." *Id.* The court granted GSSI's claim for recoupment for the total amount of $31,077,532.[2]

[2] The only amount requested by GSSI that the court did *not* award was an additional $11.5 million that GSSI anticipated it would spend "with reasonable certainty" in the future but which had not yet been authorized or committed. The court rejected this request, concluding that "[t]his figure is no more than an estimate of possible future expenditures. Its speculative character is underscored by the fact that in a period of almost six years, these costs have yet to be authorized." *Findings and Conclusions* at 15 (as

II. DISCUSSION

A. *Standard of Review*

Interpretation of the plain language of a contract is a question of law subject to *de novo* review by this court. *See Hoh Co. v. Travelers Indem. Co.*, 903 F.2d 8, 12 n.6 (D.C. Cir. 1990) ("When we have no need to depart from the plain wording of the contracts and no extrinsic evidence is introduced, we are not bound by the clearly erroneous standard of review."); *Washington Metro. Area Transit Auth. v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980). The district court's post-hearing findings of fact should be reversed only if clearly erroneous. *United States v. Western Elec. Co.*, 900 F.2d 283, 293 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990); *City of Las Vegas v. Lujan*, 891 F.2d 927, 931 (D.C. Cir. 1989).

B. *Environmental Expenditures at Gadsden*

During the evidentiary hearing, the parties stipulated to the fact that GSSI had incurred actual expenditures totaling $18,085,358 through July 1991.[3] In addition, GSSI claimed, and the district court awarded, $10,620,741 corresponding to authorized expenditures for work in progress during 1991 and 1992. *Findings and Conclusions* at 7.

As of July 31, 1991, GSSI had spent (or had committed itself to spend) the following amounts:

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corrected by *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C. Dec. 16, 1991)).

[3] There is an $80 discrepancy between the actual amount awarded and the total figure for expenditures included on GSSI's corrected exhibit. *Compare Findings and Conclusions* at 7 ($18,085,438) *with* Defendant's Exhibit ("DX") 5012-1, line 9, col. 5 ($18, 085,358).

Coke Plant		
(1)	Rebuilding brickwork in end flues and through wall of Coke Battery #2	$6,000,000
(2)	Installation of 260 coke oven doors and cleaners	$2,589,514
BOF/Melt Shop		
(3)	Installation of fume suppressor and other emission control devices in Basic Oxygen Furnace ("BOF")/Melt Shop	$4,196,566
(4)	Repairs to the BOF precipitator	$1,493,569
Benzene		
(5)	Installation of benzene emission controls at coke byproduct plant	$9,000,002
Wastewater Treatment		
(6)	Construction of coke byproducts wastewater treatment plant	$3,298,063
(7)	Construction of galvanizing line wastewater treatment plant	+ $2,128,385
TOTAL		= $28,706,099

1. Coke Plant

In November 1988, the Alabama Department of Environmental Management ("ADEM") filed a complaint against GSSI, alleging that emissions from the coke plant violated certain sections of the Alabama Air Pollution Control Rules. *Alabama Dep't of Envtl. Mgmt. v. GSSI*, Complaint, No. CV-88-856 (Ala. Cir. Ct. Nov. 8, 1988). One month later, on December 20, 1988, the state court entered a consent order requiring GSSI to make end flue and through wall repairs on the No. 2 coke ovens. *See Findings and Conclusions* at 11-12; *Alabama Dep't of Envtl.*

Mgmt. v. GSSI, Consent Order, No. CV 88-856 (Ala. Cir. Ct. Dec. 20, 1988).

2. BOF/Melt Shop

The same December 1988 consent order required GSSI to install a fume suppression system on the hot metal transfer station of the BOF. *See id.* at 5. In order to comply with certain sections of the Air Pollution Control Rules, GSSI agreed to carry out extensive repairs on the BOF precipitator. *Id.* at 6.

3. Benzene

In September 1989, the EPA issued its Final Rule regarding the National Emission Standard for Hazardous Air Pollutants ("NESHAP"), including the standard for benzene emissions from coke by-products recovery plants. *See* 54 Fed. Reg. 38,044, 38,073-77 (1989). In January 1990, the EPA informed GSSI that it would have to comply with the benzene NESHAP by September 1991. *See* Letter from Winston Smith, EPA, to Ken Means, Chief Engineer, GSSI (Jan. 26, 1990) (DX 386-A); Testimony of John D. Lefler, GSSI Vice President of Manufacturing (D.D.C. Aug. 26, 1991) at 85. In order to comply with the requirements in the January 1990 letter, GSSI installed a cooling tower, gas blanketing facilities, and mechanical and liquid seals to keep benzene from emanating from containment vessels. *See id.* at 80-81, 177.

4. Wastewater Treatment

In June 1986, ADEM issued an administrative order alleging that GSSI was discharging pollutants into a creek near the Gadsden plant in violation of Alabama law. In December 1987, ADEM issued a permit authorizing certain discharge levels in accordance with the National Pollution Discharge Elimination System ("NPDES"). *Id.* at 100-02.

Finally, in an August 1988 administrative order, ADEM required GSSI to submit a pollution abatement plan designed to bring the Gadsden plant into compliance with the December

1987 NPDES permit. *See In re Gulf States Steel, Inc.*, Order No. 88-081-WP (ADEM Aug. 19, 1988). GSSI constructed two wastewater treatment plants — one to remove compounds such as benzene and cyanide from the wastewater of the coke by-products plant and one to remove zinc from the galvanizing line — in order to comply with the August 1988 administrative order.

C. Notice

The district court concluded below that "LTV had timely notice, written and otherwise, of GSSI's indemnification claims." *Findings and Conclusions* at 14. LTV argues on appeal that this conclusion is clearly erroneous, because there is nothing in the record to support the conclusion that it ever received proper notice of (1) the 1988 complaint alleging emissions violations at the coke plant and at the BOF/melt shop; (2) the 1989 benzene NESHAP and the 1990 EPA letter; or (3) the 1988 administrative order requiring compliance with the 1987 NPDES permit concerning wastewater pollutants. Under section 9.3 of the Asset Agreement, GSSI explicitly agreed to

> give prompt notice to [LTV] of the institution of any actions, suits or proceedings and demands at any time instituted against or made upon [GSSI] in connection with which [GSSI] would claim indemnification under Section 9.1 or 9.2 and [GSSI] shall, at the time of giving such notice, if [LTV] shall agree that it would have responsibility to indemnify under this section 9.3, give [LTV] full authority to defend, adjust, compromise or settle the action, suit, proceeding or demand of which such notice shall have been given, in the name of [GSSI] or otherwise as [LTV] shall elect. In the event of any claims under Section 9.1 or 9.2 for indemnification, [GSSI] shall advise [LTV] in writing of the amount and circumstances surrounding said claim.

Asset Agreement § 9.3. Clearly, the purpose of this notice provision is to provide LTV with the opportunity to participate in the settling of any claims and the negotiating of any agreements resulting in the expenditure of funds for which it would ultimately be responsible. Of course, LTV could deny responsibility for the costs, but the issue of liability would then be the subject of litigation. The critical point is that GSSI would satisfy its obligations under section 9.3 only by providing notice *prior* to the final settlement of any outstanding claim.

1. Ohio Law

"The purpose of a requirement of notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, and to prevent fraud and imposition upon it." *West Am. Ins. Co. v. Hardin*, 571 N.E.2d 449, 452 (Ohio App. 1989). Under Ohio law, a notice provision in an indemnity agreement is considered to be "of the essence of the contract" and is regularly enforced. *Thomas v. Studley*, 571 N.E.2d 454, 620 (Ohio App. 1989); *Patrick v. Auto-Owners Ins. Co.*, 449 N.E.2d 790, 791 (Ohio App. 1982); *Zurich Ins. Co. v. Valley Steel Erectors, Inc.*, 233 N.E.2d 597, 598 (Ohio App. 1968). Ohio has rejected, however, the traditional view that treats strict compliance with the terms of a notice provision as a condition precedent to the indemnification contract; instead, the failure to comply with the notice provision must cause prejudice to the indemnitor before it is relieved of its obligation to defend or indemnify. *Hardin*, 571 N.E.2d at 452.

A provision requiring "prompt" notice to the indemnitor means "notice within a reasonable time in light of all the surrounding facts and circumstances." *Ruby v. Midwestern Indem. Co.*, 532 N.E.2d 730, 732 (Ohio 1988). Whether there has been an unreasonable delay in the giving of notice is generally considered to be a question of fact. *Patrick*, 449 N.E.2d at 791; *Zurich*, 233 N.E.2d at 599. However, courts have

on occasion ruled that the time delay was such that notice was not within a reasonable time, as a matter of law. *See, e.g., Patrick*, 449 N.E.2d at 791 (court ruled that claimant's one-year delay in reporting "theft" of car by ex-wife was unreasonable as a matter of law). Under Ohio law, prejudice to the indemnitor is presumed when the delay in giving notice is "unreasonable." This presumption may be rebutted by the presentation of evidence that the indemnitor was not, in fact, prejudiced by the delay. *Ruby*, 532 N.E.2d at 732; *Patrick*, 449 N.E.2d at 791; *see also Imperial Casualty & Indem. v. Buckeye Union Ins. Co.*, No. CA-7989, 1990 Ohio App. LEXIS 1420 (Ohio Ct. App. Apr. 9, 1990) at *8 (when notice is unreasonably delayed, burden shifts to claimant to rebut presumption that indemnitor was prejudiced by delay).[4]

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[4] The Court of Appeals of Ohio recently revisited the issue of burden-shifting when a claimant waited over eight years from the date of the accident to file a claim against her insurance company.

> The implication of the *Ruby* decision is that a delay in giving notice, in and of itself, is not a sufficient reason to deny coverage. Prejudice to the insurer must be demonstrated.
>
> Therefore, the trial court, in the instant cause, erred in stating that the lapse of time between the accident date and the date of notice, in and of itself, was sufficient to defeat the right of appellant to coverage.

Priester v. Travelers Ins. Co., No. 90-T-4426, 1991 Ohio App. LEXIS 1394 at *5 (Ohio App. Mar. 29, 1991) (citations omitted). The claimant in *Priester* had presented ample evidence that the insurance company had not been prejudiced by the delay. As the concurring opinion makes clear, once it is demonstrated that notice had been unreasonably delayed, prejudice to the insurer is presumed absent evidence to the contrary. "The burden of going forward to rebut this presumption rests with the insured. Once the trial court is presented with such evidence, the sufficiency and weight of that evidence becomes the duty and function of the trier of fact." *Id.* at **9-10 (Ford, J., concurring) (citations omitted). The lower court's error in *Priester* occurred not because the burden of presenting the evidence of prejudice was shifted to the claimant; it occurred because the trial judge refused to weigh the evidence once the claimant had presented it.

2. GSSI's Notice to LTV

GSSI makes several alternative arguments on the question of notice. First, it argues that it effectively provided notice when it filed its proofs of claims in the bankruptcy court. Second, it argues that, because of the automatic stay provision in the Bankruptcy Code, it was precluded from complying with the notice provision. Third, it argues that LTV was not prejudiced by the failure to comply with the notice provision because it had actual notice of the environmental problems at the Gadsden plant and of the nature of GSSI's indemnification claims.

a. Proofs of Claim

LTV filed for bankruptcy in July 1987, and GSSI filed three separate proofs of claim on November 25, 1987. *See In re Chateaugay Corp.*, Nos. 86 B 11272, 11273, 11291 (Bankr. S.D.N.Y. Nov. 25, 1987). In each claim, GSSI indicated that the amount due was "contingent - unknown" and that the total sum claimed was "undetermined as of this date." The only reference to the "ground of liability" was an attachment — Exhibit C — to each proof of claim, where GSSI indicated that its "contingent claims against Debtor" are based on "contracts, orders, and other instruments applicable to the Debtor." Among those listed was the Asset Agreement, as well as orders entered by the district court in connection with the sale of the Gadsden plant.

Proofs of claim are not intended to be elaborately detailed documents. As one bankruptcy court has explained, "[a] proof of claim for an unsecured creditor requires little more than a listing of name, address, amount of claim (or a listing as "unliquidated" or "contingent"), and a signature. It should take less than five minutes to fill out." *In re Great W. Cities, Inc.*, 88 B.R. 109, 114 (Bankr. N.D. Tex. 1988). The proofs of claim submitted to the bankruptcy court made no mention of "the institution of any actions, suits or proceedings and demands at any time instituted against or made upon [GSSI] in connection with which [GSSI] would claim indemnification." Asset Agreement

§ 9.3. Furthermore, referring only to "contingent claims" and "unknown" amounts, the proofs of claim clearly failed to "advise [LTV] in writing of the amount and circumstances surrounding" the claim as required by section 9.3. *Id.*

In order to comply with the bar date, GSSI had to submit its proofs of claim on or before November 25, 1987, which was prior to any of the regulatory actions of the EPA or ADEM that led to the repairs and improvements at the Gadsden plant. Obviously, the proofs of claims could not, by themselves, satisfy the notice requirement of section 9.3, because the claims for which GSSI seeks indemnification had not yet been made by the time the proofs of claim were presented.

b. Automatic Stay

Anticipating the many problems with its argument that the proofs of claim were sufficient notice under the Asset Agreement, GSSI argues alternatively that it was precluded, by virtue of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a) (1988), from providing the notice specifically required.[5] The filing of bankruptcy stays "[a]ny act to obtain

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[5] Under the Bankruptcy Code, a petition

operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

. . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

11 U.S.C. § 362(a) (1988).

possession of property from the estate," *id.* § 362(a)(3), and courts have interpreted this broadly to encompass such actions as changing the locks in order to effect an eviction, *In re Atlantic Business & Community Corp.*, 901 F.2d 325, 328 (3d Cir. 1990), sending notices of default or of acceleration, *In re Manville Forest Prods. Corp.*, 43 B.R. 293, 298 (Bankr. S.D.N.Y. 1984), *aff'd on relevant grounds*, 60 B.R. 403 (S.D.N.Y. 1986), or threatening the termination of a lease, *see In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988).

It is clear, however, that "mere requests for payment are not barred absent coercion or harassment by the creditor." *Morgan Guar. Trust Co. v. American Sav. & Loan*, 804 F.2d 1487, 1491 (9th Cir. 1986) (presentment of notes for payment was not prohibited by automatic stay), *cert. denied*, 482 U.S. 929 (1987); *In re Sixteen to One Mining Corp.*, 9 B.R. 636, 638 (Bankr. D. Nev. 1981) ("[S]o long as there is no attempt to obtain possession of the terms of a lease. A landlord is entitled to put a lessee on notice of where and when the lessee is failing in performance."). The automatic stay is designed to protect the debtor from acts "that immediately or potentially threaten the debtor's possession of its property. . . . The activities that are specifically prohibited all involve attempts to confiscate the debtor's property or require the debtor to act affirmatively to protect its interests." *Morgan Guaranty*, 804 F.2d at 1491.

Finally, the purpose of the notice provision in the Asset Agreement was to protect the interests of the indemnitor — to allow it "to defend, adjust, compromise or settle the action, suit, proceeding or demand." Asset Agreement § 9.3. Notice would have given the trustee of LTV's estate the opportunity to participate in the fashioning of the 1988 consent order and in negotiating the terms of compliance with the administrative orders and environmental regulations. This would have been entirely consistent with the purposes of the automatic stay

provision, for it would have served to protect the interests of the debtor's estate. Neither the language or purpose of the automatic stay provision prevented GSSI from giving notice to LTV under section 9.3.

3. Notice by Other Means

GSSI argues that, besides the proofs of claim discussed above, support for the conclusion that LTV had notice may be found in the following: (1) depositions of John Steinhauer, Secretary, GSSI, and James S. Van Tiem, Treasurer, GSSI; and (2) two letters, one from Steinhauer to Glenn Moran, LTV Corporate General Counsel on June 6, 1990 and the other from J.F. Powers, LTV Counsel, to Steinhauer on June 7, 1990.

a. Depositions

At his deposition in August 1991, GSSI's Secretary recalled having had certain meetings with representatives from LTV:

A: There was a conversation that I had, which, probably, related to talk about environmental things in probably 1987 when we had Mike Hiemstra [from LTV] and the investment bankers for probably the creditors committee and LTV about discounting the note.

. . . .

I'm sure environmental matters would have been discussed. The second [meeting] was when we discussed with the union's investment bankers, Lazard Freres, we had a meeting with them in New York, which would probably have been like December of '88 or December of '87, maybe. I think, probably December of '87 we had a conversation with them where financial data was discussed and the state of the company and so forth.

. . . .

Q: What was said about environmental issues?

A: I'm not sure anything was. I can't believe the state of the company could have been talked about without an investment banker asking us about environmental matters.

. . . .

Q: Was anything said about LTV's possible indemnification responsibilities [at the meeting with the investment bankers]?

A: That was not discussed. What we did discuss was because the company had made such a statement about the financial viability of the Gadsden plant, if we were going to get a discount through the bankruptcy, we tried to play up on that financial viability and got into the finances. So that was the hot button.

. . . .

Q: In any of the subsequent meetings in that series with Mr. Hiemstra, was there any discussion about potential indemnification responsibilities as opposed to take our settlement because of this viability issue?

A: We tried to keep it very simple and what we thought would be the best, simplest, cleanest discussion.

. . . .

Q: Prior to 1990 or '91, were there any discussions with LTV about any potential breach of warranties or indemnification?

A: Other than a proof of claim, no.

Transcript of Deposition of John Stuart Steinhauer (Aug. 8, 1991) at 88-91, 106-07, 108.

GSSI's Treasurer testified at his deposition that there were several meetings between representatives from GSSI, LTV, and investment banks in the summer of 1987 to discuss redeeming the promissory Note.

Q: Was there any discussion in connection with any of those meetings or at any of those meetings about the indemnification provision in the asset sales agreement?

A: I don't recall specific discussions about that.

Q: Was there any discussion of environmental liabilities that LTV might have in connection with Gadsden?

A: I don't recall any specific discussions.

Q: Do you recall any general discussions at that time?

A: I don't remember.

. . . .

Q: In those discussions with Shearson and/or First Boston, was there any mention of any indemnification obligation LTV had to Gulf States, or the Brenlin Group?

A: I believe so, but I'm not 100 percent sure.

Q: What do you believe was said by whom?

A: I think there was discussion of environmental issues and general indemnifications made by LTV.

Q: And who said that? First of all, what was said and who said it?

A: I don't recall specifically what was said.

Transcript of Deposition of James D. Van Tiem (Aug. 7, 1991) at 65-67.

The testimony of these two GSSI employees is clearly inadequate to establish that LTV was given notice of the environmental claims against the Gadsden plant. Not only did the purported conversations, like the proofs of claim, predate most of the relevant regulatory activity, but neither deponent recalled for sure whether environmental issues had even been discussed. Indeed, Steinhauer specifically recalled that the issue of LTV's indemnification was *not* discussed. Van Tiem simply could not recall whether there had been any discussion of indemnification.

Contrary to GSSI's assertion, these depositions offer no support whatsoever for the conclusion that LTV had notice of the specific regulatory measures taken against the Gadsden plant and of the specific remedies implemented in response.

b. Letters

GSSI proposed to satisfy its obligation under the promissory Note by paying LTV $26 million, subject to certain conditions, including:

> An agreement by LTV and its affiliates as debtors and debtors in possession to defend, indemnify, and hold harmless Gulf States from and against any liability or obligation directly or indirectly resulting from or arising out of the conduct of the "Business", as defined in the [Asset Agreement] ..., including, without limitation, employee, tax, environmental, products liability or bulk sales claims, and claims of LTV's creditors as to the validity of title.

Letter from Steinhauer to Moran (June 6, 1990) at 1.

This letter clearly fails to satisfy the requirement of giving "prompt notice to [LTV] of the institution of any actions, suits or proceedings and demands at any time instituted against or made upon [GSSI] in connection with which [GSSI] would claim indemnification," Asset Agreement § 9.3. It refers generally to all "employee, tax, environmental, products liability or bulk sales claims" for which LTV would be responsible under the Asset Agreement, but it does not discuss the nature or amount of any such claims.

In any case, the letter quite obviously comes much too late to satisfy the requirement that LTV be given notice in advance of any settlement or other resolution of outstanding claims. Even if the June 6, 1990 letter had provided the detail required by section 9.3, it would not have given LTV sufficient notice to have allowed it to participate in the negotiation of the December 1988 consent order or in the compliance with either the 1989

EPA benzene regulation or the 1988 administrative order regarding the contamination of the wastewater.

The June 7, 1990 letter consists of only one sentence in which a representative from LTV indicates to GSSI that "LTV has no interest in pursuing the Gulf States settlement proposal." Letter from Powers to Steinhauer (June 7, 1990). At most, this letter proves that LTV received the June 6 letter. But since the notice provided by the June 6 letter was insufficient and untimely, LTV's acknowledgment of it is irrelevant.

4. Actual Notice

None of the purported "notices" that GSSI provided LTV—the proofs of claim, the vaguely recalled conversations that took place in 1987, or the letters proposing and acknowledging a settlement offer—satisfied the contractual notice requirement. GSSI's last recourse, then, is to argue that LTV had actual notice of the environmental problems at the Gadsden plant when it submitted its Exhibit "V" to the Asset Agreement[6] and that it was therefore not prejudiced by GSSI's failure to provide notice under section 9.3. Of course, knowledge of the environmental problems at the plant is not the same as knowing about the specific steps taken by the ADEM and the EPA to require remedial action. There is nothing in the record to indicate that LTV had actual notice of (1) the November 1988 complaint alleging violation of emission standards at the coke plant and at the BOF/melt shop; (2) the September 1989 benzene NESHAP or the January 1990 EPA letter setting the date for final compliance; or (3) the December 1987 NPDES permit and the August 1988 administrative order requiring the construction of the two wastewater treatment facilities. Furthermore, there

[6] Exhibit "V" is attached to the Asset Agreement and contains a lengthy list of environmental problems of which LTV was aware at the time of the closing. It explicitly states that "LTV makes no representation or warranty that it is in compliance with all environmental laws and regulations applicable to the Business in all material respects." Exhibit V to Asset Agreement.

is nothing in the record to suggest that GSSI ever informed LTV, prior to defaulting on the Note, that it intended to hold LTV liable for these environmental expenses.

5. Summary

LTV was prejudiced by GSSI's failure to give notice. In the leading case on notice, the Ohio Supreme Court explained why the failure to provide timely notice in an insurance contract was prejudicial:

> First, [the delay] deprived [the insurer] of any meaningful opportunity to investigate the accident and determine the relative fault of the parties involved; and second, because the deadline for filing claims against the [deceased's] estate had passed, [the insurer] lost any ability to assert a claim against the estate. Thus we find that appellants' failure to provide timely notice was prejudicial to appellee and its right to subrogation.

Ruby v. Midwestern Indem. Co., 532 N.E.2d 730, 732 (Ohio 1988). LTV has been prejudiced in much the same way. In *Ruby*, the claimants delayed notifying their insurance company for only eleven months. In this case, the record reveals that GSSI informed LTV of the extent of its environmental corrections when it filed its statement of costs in anticipation of the evidentiary hearing on July 15, 1991; this was several years after the obligation to make the repairs arose.[7]

Any deficiency in actual evidence to support the conclusion that LTV was, in fact, prejudiced by the failure to provide proper notice is overcome by the presumption in Ohio

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[7] The fact that the law on notice was developed in the insurance context is significant, for courts may be reluctant to require strict compliance with notice provisions in insurance policies because claimants are often lay people with little understanding of the technical requirements. But where the claimant is a sophisticated corporation that has been well-represented by counsel, this concern about strict application of the notice requirement is less compelling.

law arising from GSSI's unreasonable delay in providing notice under section 9.3. GSSI has the burden of rebutting this presumption by coming forward with evidence that LTV was not prejudiced. *Id.*; *Patrick v. Auto-Owners Ins. Co.*, 449 N.E.2d 790, 791 (Ohio App. 1982). There is nothing in the record to indicate that LTV was not prejudiced by the delay, and GSSI has failed to bear its evidentiary burden.

The district court's conclusion that LTV had timely notice of GSSI's indemnification claims was clearly erroneous. The district court adopted the proposed finding of GSSI which purported to rely on the proofs of claim, the conversations in 1987 and the June 1990 letters for evidence that notice was given. But as we have seen, none of these satisfies the plain terms of the notice requirement contained in the Asset Agreement, and LTV was deprived of the opportunity to participate in the defense and settlement of the underlying claims for which it was allegedly responsible. GSSI's failure to give notice precludes its claim for indemnification.[8]

D. Interest

Rule 67 provides that

> [i]n an action in which any part of the relief sought is a judgment for a sum of money ... a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. . . . The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

FED. R. CIV. P. 67.

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[8] Of course, we do not now reach the question of whether LTV would have been liable under the plain terms of the Asset Agreement, had GSSI given proper notice, for the more than $28 million incurred to bring the Gadsden plant into compliance.

We have found very few cases construing Rule 67. *See* 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2991 (1973) (agreeing with prediction that there would not be " 'very many occasions for the application of this rule' "). The decision whether to allow a Rule 67 deposit generally lies within the discretion of the district court. *See Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1475 (5th Cir.), *modified on other grounds*, 831 F.2d 557 (5th Cir. 1987); *In re Department of Energy Stripper Well Exemption Litigation*, 124 F.R.D. 217, 220 (D. Kan. 1989). LTV argues that the district court abused its discretion, however, by permitting GSSI to use Rule 67 to deposit the amount owing under the Note and thereby stop the accrual of interest at the default rate of 18-3/4%.

It is well-settled that Rule 67, like all of the Federal Rules of Civil Procedure, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1988). "The Rule 67 procedure provides a place of safekeeping for disputed funds pending the resolution of a legal dispute, but it cannot be used as a means of altering the contractual relationships and legal duties of the parties." *In re Department of Energy Stripper Well Exemption Litigation*, 124 F.R.D. at 218-19; *Prudential Ins Co. v. BMC Indus.*, 630 F. Supp. 1298, 1300 (S.D.N.Y. 1986).

Under the terms of the Note given to LTV by GSSI, "[u]pon the occurrence of any Event of Default [which includes the failure to pay the full amount of any payment of principal]. . . , the entire unpaid principal amount hereof and interest accrued thereon shall become immediately due and payable, at the option of the holder." Note § 5(b). Furthermore, "[a]fter maturity, whether by acceleration upon default or otherwise, all sums then due hereunder shall bear interest at the rate set forth above [16-3/4%] plus Two Percent (2%)." *Id.* preamble. As of June 21, 1991, when the district court signed its *Deposit Order*, GSSI was in default under the Note and was subject to the default rate

of interest of 18-3/4%. On June 21, 1991, the district court ordered that, upon payment of the principal plus interest at the default rate between February 1, 1991 and June 21, 1991, "[a]ny remaining obligation of GSSI to LTV Corporation. . . on the January 21, 1986 Promissory Note. . . is hereby satisfied and paid in full." *Deposit Order* at 1.

We do not believe, however, that the district court had the authority, under Rule 67, to alter the substantive contractual right of LTV to receive, upon GSSI's default, an 18-3/4% annual interest rate on the principal amount still owing under the Note. The district court abused its discretion when it effectively altered the terms of the contract by substituting the market rate of interest available in the escrow account for the rate to which the parties had agreed in the Note.

Furthermore, the amount currently held in escrow is subject to the default rate of 18-3/4% rather than to the contract rate of 16-3/4%. Under Ohio law,

> when money becomes due and payable upon any bond, bill, note, or other instrument of writing. . . , the creditor is entitled to interest at the rate of ten per cent per annum, and no more, *unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.*

OHIO REV. CODE ANN. § 1343.03(A) (Anderson Supp. 1991) (emphasis added). A special default rate of interest is permitted under Ohio law.

> [M]oney paid by the borrower to the lender for the use of money after it is past due is regarded as liquidated damages for the detention of the money, and the parties to the lending contract may provide in it for a rate after maturity higher than the rate before, except it must not exceed the limit fixed by the usury statute.

Hacket v. Kripke, 23 N.E.2d 438, 438 (Ohio Ct. App. 1939); *see also Cardinal Fed. Sav. & Loan Ass'n v. Michaels Bldg. Co.*, C.A. No. 12881, slip op. at 4-5 (Ohio Ct. App. Sept. 30, 1987) (LEXIS, States library, Ohio file) (default rate represented parties' bargained for damages, not unenforceable penalty, where borrower "entered into the agreement, a commercial loan, which clearly included the default rate of interest; indeed, it could be said that the increased default rate provision represented part of the original consideration for which the loan was given").

As of June 21, 1991, when the district court entered its *Deposit Order*, GSSI had been in default for over four months. The obligation under the Note had been accelerated, and the applicable rate of interest under the Note was 18-3/4%. GSSI chose to litigate the issue of LTV's liability rather than to pay LTV the amount due under the Note and then seek relief as a creditor in bankruptcy court. The risk that GSSI bore in failing to pay LTV the full amount, free and clear of any claims, was that it might lose on appeal and be forced to pay the full amount plus the default rate of interest expressly provided for in the Note. Some risks simply do not pay off.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is reversed and the case remanded for entry of judgment in favor of LTV for the full amount currently held in escrow plus the difference between the earnings of the escrow fund and the amount of interest that would have been earned at an annual rate of 18-3/4% on $31,293,000 between June 21, 1991 and the date of judgment on remand.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LTV CORPORATION, LTV STEEL COMPANY INC., and GULF STATES STEEL CORPORATION,
Plaintiffs,

v.

GULF STATES STEEL, INC., OF ALABAMA,
Defendant.

Civil Action
No. 91-1072

FILED Dec. 5, 1991

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background Summary and Procedural Status

This lengthy litigation commenced with the Order of this Court of August 2, 1984 divesting plaintiff LTV[1] of its ownership of the Gadsden steel mill and the subsequent purchase of Gadsden by defendant Gulf States Steel, Inc., of Alabama ("GSSI") on January 31, 1986. *United States v. LTV Corp.*, Civil Action No. 84-0884 (D.D.C.). The purchase price was covered by a note for $38,500,000. On or about July 17, 1986, LTV filed a voluntary petition for reorganization in the Bankruptcy Court for the Southern District of New York. On November 29, 1987, GSSI filed its proof of claims for LTV's alleged liabilities for environmental violations. From January

[1] "LTV" refers collectively to the LTV Corporation, LTV Steel Company Inc., and Gulf States Steel Corporation.

31, 1986 to February 1, 1991, GSSI had made all payments due LTV on the note: $9,625,000 principal and $27,907,187 interest, for a total payment of $37,532,187. On February 1, 1991, GSSI declined to make the $4,812,500 payment then due LTV on the note. This adversary proceeding by LTV, as debtor in possession, was immediately initiated to recover the balance due on the note of $31,293,281, plus accrued interest and attorney's fees. Pursuant to defendant GSSI's Motion to Withdraw the Reference to the Bankruptcy Court, Judge Stanton of the Southern District, to whom the matter had been assigned, issued an order Withdrawing the Reference and Transferring the Venue to this Court. *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1826 (S.D.N.Y. May 3, 1991). In our Order of July 1, 1991, we denied plaintiff LTV's Motion for Summary Judgment. At the same time we held that defendant GSSI was not precluded from recovery on its claim for recoupment. Pending before us are LTV's claim for the balance due on the note and GSSI's claim (not exceeding the amount held in escrow pursuant to this Court's Order of June 21, 1991) for the costs it has incurred in correcting environmental violations that arose "directly or indirectly" out of the conduct of Business on or before the closing date which is not an Assumed Liability. *See* January 31, 1986 Agreement of Purchase and Sale of Assets ("Asset Agreement"), Section 9.1(a)(ii).

We held an evidentiary hearing on these issues on August 26 and 27, 1991. Both sides presented live testimony and literally hundreds of exhibits, as well as numerous stipulations.[2] The issues have been extensively briefed.

To summarize the contentions of the parties, it is defendant GSSI's position that plaintiff LTV agreed to be liable for costs

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[2] We are grateful to both sides, particularly the plaintiffs, for reducing the witnesses' direct testimony to writing, introducing said into evidence, and presenting the witnesses for cross-examination. This aided greatly in expediting the hearing.

incurred in correcting environmental violations arising directly or indirectly out of the conduct of Business on or before January 31, 1986. Plaintiff LTV strenuously disputes defendant's contention and asserts that defendant's expenditures were for the most part not necessary to comply with the environmental requirements in effect on January 31, 1986. Admittedly, defendant from January 31, 1986 to July 31, 1991, has spent over $100,000,000 in capital improvements to an aged and aging steel mill, but, according to plaintiff, such expenditures, however necessary to maintain the plant as a productive and viable entity, were not needed for environmental reasons.

FINDINGS OF FACT

1. Defendant, GSSI, is a corporation organized and existing under the laws of the State of Alabama with its principal place of business in Gadsden, Alabama. GSSI was organized to own and operate the Gadsden plant, acquired pursuant to this Court's Orders in *United States v. LTV Corp.*, Civil Action No. 84-0884 (D.D.C.).

2. Plaintiff, the LTV Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Dallas, Texas. Plaintiff, LTV Steel Company, Inc., is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Cleveland, Ohio. Plaintiff, Gulf States Steel Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Dallas, Texas. On July 17, 1986, LTV filed a petition for reorganization under 11 U.S.C. § 1011, *et seq.*

3. On August 26, 1991, this Court granted the August 23, 1991 Motion of the Attorney General of the State of Alabama to appear as *amicus curiae* pursuant to its *parens patriae* authority and Ala. Code §§ 22-22A-1 to 16 (1990). Since 1982, the Alabama Department of Environmental Management

("ADEM") has had authority to enforce state environmental laws and administer federally approved or delegated environmental programs.

4. As recognized by Judge Stanton in *LTV Corp. v. Gulf States Steel Inc.*, No. 91-1826 (S.D.N.Y. May 3, 1991), this Court has continuing subject matter jurisdiction, pursuant to the August 2, 1984 Final Judgment and other Orders entered in *United States v. LTV Corp., supra.* This was an action initiated under Section 7 of the Clayton Act, 15 U.S.C. § 18. On May 13, 1991, *LTV Corp. v. Gulf States Steel Inc., supra*, was assigned to this Court as *LTV Corp. v. Gulf States Steel, Inc.*, No. 91-1072 (D.D.C.), and designated as a related case to *United States v. LTV Corp., supra.*

5. GSSI's Gadsden plant is an integrated steel mill, *i.e.*, one that has cokemaking, ironmaking, steelmaking, rolling and finishing processes.

6. Coke is made by heating bituminous coal to remove volatiles leaving a mass of nearly pure carbon that is used as a fuel in the iron and steelmaking processes.

7. At Gadsden, coke is manufactured in two coke batteries, *i.e.*, No. 2 and No. 3, attached to a by-products recovery plant. No. 2 was placed in operation in 1942; No. 3 in 1965. Each battery has 65 ovens; each oven has two doors. The doors are refractory-faced assemblies placed into jambs. A jamb is an iron casting, held by steel clips that are bolted to vertical steel beams or buck stays, providing the structural framework for the coke oven.

8. After a coke oven is charged by filling it with coal, the temperature is raised by burning gas in the sidewall flues. At GSSI, coal is coked for approximately 24 hours. When coking is complete, the doors are removed and a ram is inserted that pushes the coke from the oven into a quench car that carries it to a tower where it is cooled by water.

9. During coking, approximately 30 percent of the coal's weight is volatized into gases, water vapor and solids that are further processed at GSSI's coke by-products recovery plant. By a series of cooling and chemical processes, various products are then separated, including tars, ammonia sulfate, naphthalene, and benzol. An organic volatile chemical released during these processes is benzene.

10. At each process stage in GSSI's coke by-products recovery plant, wastewater streams are generated. Wastewater streams also are generated at other GSSI processes, including the galvanizing line, where the acid rinse overflow is a major source of zinc found in GSSI's wastewater.

11. At GSSI, iron ore and scrap are refined into steel at the Basic Oxygen Furnace ("BOF") melt shop, where two BOF vessels are located. Scrap and molten iron from the blast furnace are poured into the BOF vessels from transfer ladles causing emission of iron oxide particulates. The molten iron is then desulphurized and slag is skimmed, releasing additional gases and particulates. If these emissions are not captured by the baghouse system, they escape through the monovent (roof monitor). Afterwards, oxygen is blown into the molten iron, creating an exothermic reaction releasing additional gases and particulates that are removed through a water-cooled hood system into an evaporation chamber and then to an electrostatic precipitator. At GSSI, approximately 4 tons of particulates are generated for every heat of steel produced. GSSI's BOF precipitator, built in 1965, has a shorter residence time for particulate collection and a smaller area of electrodes than is required for standard operation.

12. Compliance with environmental laws and regulations requires compliance with the applicable regulatory standard on a continuous day-to-day basis.

13. Expenditures at the Gadsden plant prior to January 31, 1986, under both Republic an LTV ownership, were inadequate

to accomplish environmental compliance. In January 1986, LTV admitted that at least $18-21 million would be required for environmental corrections.

14. From January 31, 1986 to July 31, 1991, in the normal course of business, GSSI had made authorized expenditures of approximately $130 million for capital improvements, including $18,085,438 in correcting environmental violations that arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986.

15. The foregoing expenditures of $18,085,438 cover repairs in the following categories: coke plant (coke oven doors and jambs, end flue and thru wall and benzene control), BOF/melt shop (fumes suppressor, precipitator and emission control), and water (wastewater treatment plant and galvanizing line).

16. Interest on $18,085,438 as of July 31, 1991, less capitalized interest of $617,924, amounts to $2,371,353.

17. In addition, expenditures in the amount of $10,620,741 have been authorized and are anticipated, but not yet fully incurred, for correcting environmental violations which arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986. These authorized, but yet not incurred, additional expenditures cover necessary repairs in the end/flue and thru wall, benzene control, and emission control. Defendant's Exhibit ("DX") 5012-1.

18. Anticipated, but not authorized costs are estimated by defendant, as of July 31, 1991, to be $11,500,000. DX 5004-1.

19. GSSI's operation did not increase the net emissions from the plant. GSSI has significantly increased maintenance expenditures above those made by LTV, particularly at the coke plant and BOF/melt shop.

20. Section 4.9.4(a) of the Alabama Air Pollution Control Rules and Regulations ("Section 4.9.4(a)") provides:

> There shall be no visible emissions during the pushing cycle, other than water mist or vapor, within an opacity which is greater than forty percent (40%) for more than one (1) push per hour per battery.

21. Section 4.9.8 of the Alabama Air Pollution Control Rules and Regulations ("Section 4.9.8") provides:

> There shall be no visible emissions, other than water mist or vapor, with an opacity greater than twenty percent (20%) from any stack except for a period or periods aggregating not more than three (3) minutes in any consecutive sixty (60) minutes.

22. Section 4.9.6(a) of the Alabama Air Pollution Control Rules and Regulations ("Section 4.9.6(a)") provides:

> There shall be no visible emissions, except non-smoking flame, from any opening on the coke oven doors from more than fifteen percent (15%) of the coke oven doors on any battery at any time.

23. The Gadsden plant has a documented history of non-compliance with environmental requirements. As long ago as June 21, 1974, the Environmental Protection Agency ("EPA") reported that the coke plant was not in environmental compliance. Failure to achieve compliance continued to be a concern to EPA in 1975. In order to secure a permit to continue operating No. 2 Coke Battery, Republic promised to shut down and replace this battery by the second half of 1981. Republic reconsidered when it realized $4-5 million was required to maintain operations until 1981. On March 30, 1976, an abatement order was issued requiring submission of a schedule and costs to achieve compliance by December 31, 1976. Although a September 13, 1976 press release claimed No. 2 Coke Battery had achieved compliance, internal Republic memorandum revealed that, as of December 9, 1976, reported emissions from No. 2 Coke Battery stack were "in violation of Commission

regulations." On September 1, 1977, Republic revealed that construction of a replacement for No. 2 Coke Battery would be "indefinitely postponed." On July 17, 1978, a delayed compliance order was issued requiring Republic to "use the best practicable systems of emissions reduction" to minimize violations of Section 4.9.8 (coke oven combustion stacks) on No. 2 Coke Battery by August 1, 1978. Failing to meet this objective, on October 15, 1979, a complaint was filed in Etowah County Circuit Court alleging violations of Section 4.9.4 caused by No. 2 Coke Battery. Republic internal memoranda and correspondence indicated that the defense of the suit would be difficult and No. 2 Coke Battery might have to be closed to settle the litigation. On June 10, 1980, EPA reaffirmed its March 3, 1978 designation, of that portion of Etowah County in which the Republic plant was located, as a non-attainment area, pursuant to Section 107(d) of the Clean Air Act, because it failed to meet the National Ambient Air Quality Standards ("NAAQS"). 45 Fed. Reg. 32,254 (June 10, 1980).

24. Under Republic's ownership, there were numerous violations of the Alabama Pollution Control Rules and Regulations (*i.e.*, Sections 4.9.4(a), 4.9.6, 4.9.8.)

25. On June 29, 1984, Republic became a wholly-owned subsidiary of LTV, and thereafter it was required that all environmental licenses be re-issued under the new corporate name, Gulf States Steel Corporation. New air permits were issued on September 13, 1985 covering all process sources of contaminants.

26. Under LTV's ownership, from June 29, 1984 to January 31, 1986, violations of Section 4.9.8 (combustion stacks) were found on at least ten occasions: August 15, 1984; August 28-29, 1984; October 2, 1984; December 5, 1984; January 16, 1985; February 7, 1985; February 22, 1985; March 14, 1985; and December 17, 27, 30, 1985. In addition, Section 4.9.6(a) violations (door emissions) were cited on October 2,

1984 and February 7, 1985. While the previous consent order did not require Republic either to shut down No. 2 Coke Battery by a specific date or if the NAAQS were not met, nevertheless it remained an enforcement option that could have been required at any time. At a September 21, 1984 ADEM meeting shortly after the final judgment was entered, LTV admitted that the No. 2 Coke Battery:

> . . . has more severe problems and its production potential is not predicated to last beyond the end of 1986. Serious problems exist with regard to wall and flue damage that cannot be addressed without major capital expenditures that would be foolhardy on a battery with such a short remaining life.

LTV's Director of Environmental Control also stated that the "No. 2 battery was so far past its useful life that no repairs could be made which would bring the flue stack into compliance." An October 5, 1984 LTV internal memorandum indicated that the No. 3 combustion stack and doors also were not in compliance. On October 31, 1984, LTV wrote ADEM:

> Following ADEM's inspections of August 15 and October 2, 1984 it was determined that major capital must be spent on battery No. 2 in order to bring it into compliance with regard to combustion stack and doors . . . . With respect to battery No. 3, a similar program of major repair and maintenance is proposed.

A November 1984 internal LTV report confirms that No. 2 was not in compliance.

27. An October 18, 1985 ADEM memorandum summarized LTV's environmental compliance at the Gadsden plant:

> LTV appears to be reluctant to commit to any definite program to achieve long-term compliance of this facility because of the always-imminent sale of the plant, low profitability, and what appears to be a

> general pattern of poor management aimed at short-term results. Short of legal action, which may threaten continued operation (or sale) of the plant, the Department's options range from tolerating the violations to EPA's involvement, which becomes more likely with time.

The EPA considered the Gadsden plant a "significant violator" since at least October 1984 because of environmental violations regarding the coke batteries.

28. The environmental violations did not immediately cease after GSSI took over Gadsden. On November 8, 1988, ADEM filed a complaint against GSSI in Alabama Circuit Court of Etowah County alleging violations of Section 4.9.4(a) at the coke batteries during August 25, 1987 — August 10, 1988. ADEM also cited violations of Section 4.9.4(a) on July 10, 1989; August 23, 1989; September 26, 1989; October 19, 23, 25, 1989; and December 5, 1989. Other violations were also cited in the complaint covering dates as early as October 31, 1986.

29. These violations of Sections 4.9.4(a), 4.9.6(a) and 4.9.8 arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986.

30. On December 20, 1988, the Alabama Circuit Court entered a consent decree which required extensive end flue and thru wall repairs on the No. 2 Coke Battery, compliance with the regulations relating to pushing on the No. 2 and No. 3 Batteries, and control of emissions from the combustion stacks on said Batteries. A strict time frame for compliance was imposed.

31. GSSI has incurred authorized costs of $5,459,096, as of July 31, 1991, in correcting violations of Sections 4.9.4(a) and 4.9.8 by rebuilding end flues and thru walls to achieve and maintain compliance with Sections 4.9.4(a) and 4.9.8, as required by the consent decree. GSSI completed repairs on 130

end flues on or about December 31, 1990 and is completing remaining end flue and thru walls. DX 5012-1.

32. GSSI will incur additional authorized costs of $540,904 to complete work-in-progress rebuilding end flues and thru walls to achieve and maintain compliance with Sections 4.9.4(a) and 4.9.8, as required by the consent decree. DX 5012-1.

33. By August 1, 1994, GSSI states that it will incur additional costs of approximately $4,500,000 to complete rebuilding end flue and thru walls to achieve and maintain compliance with Sections 4.9.4(a) and 4.9.8, as required by the consent decree. DX 5004-1.

CONCLUSIONS OF LAW

1. As previously stated, this Court has continuing subject matter jurisdiction pursuant to the Final Judgment and other Orders entered on August 2, 1984 in *United States v. LTV Corp., et al., supra*. This jurisdiction was recognized by Judge Stanton in his Transfer Order of May 3, 1991. (*See* Findings of Fact No. 4.)

2. The Gadsden plant was not in environmental compliance in 1984 at the time LTV and Republic Steel Corporation petitioned this Court to enter the Final Judgment in *United States v. LTV, supra*, and contrary to representations made at that time, therefore was not capable of "competing effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel." Nor was the Gadsden plant capable of achieving and maintaining environmental compliance on a day-to-day basis, on January 31, 1986, without the expenditure of substantial capital.

3. Under the Asset Purchase Agreement of January 31, 1986, defendant LTV had the duty, not only to retain and assume all liabilities or obligations arising directly or indirectly out of the conduct of Business on or before January 31, 1986, but also

to indemnify GSSI for such liabilities and obligations. Asset Agreement, Sections 3.1, 3.2 and 9.1. Relevant warranty and representations are set forth in Sections 4.1.5 and 4.1.13.

4. This Court's Orders in *United States v. LTV Corp., supra*, did not relate to, require and were not dependent upon GSSI installing electric furnaces to replace the cokemaking and Basic Oxygen facilities at the Gadsden plant. Electric furnaces cost more to operate and their installation would have an adverse effect upon customers for sheet steel. These two factors would prevent GSSI from being a viable competitor in the domestic steel market.

5. LTV had timely notice, written and otherwise, of GSSI's indemnification claims.

6. Pursuant to this Court's July 1, 1991 Order, GSSI is entitled to receive from LTV authorized costs incurred in correcting violations of environmental laws and regulations that arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986 in the amount of $18,085,438, by recoupment from the monies deposited in escrow and subject to this Court's June 21, 1991 Order.

7. In addition, GSSI is entitled to receive interest from LTV, on its expenditure of $18,085,438, as of July 31, 1991, less $617,824 capitalized interest, in the amount of $2,371,353, based on an end of the quarter payment convention at a statutory rate of 10 percent per annum, continuing at the rate of $4,786 per day until GSSI has received payment in full, by recoupment from the monies deposited in escrow and subject to this Court's June 21, 1991 Order.

8. Pursuant to this Court's July 1, 1991 Order, GSSI is also entitled to receive from LTV authorized and anticipated costs of $10,620,741 for correcting environmental violations which arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986.

9. GSSI has not demonstrated, with reasonable certainty, that it will incur authorized costs of approximately $22,120,741 by August 2, 1994 in correcting environmental violations that arose directly or indirectly out of the conduct of Business at the Gadsden plant prior to January 31, 1986. This figure is no more than an estimate of possible future expenditures. Its speculative character is underscored by the fact that in a period of almost six years, these costs have yet to be authorized. At the same time, Gadsden continues to authorize and make substantial capital expenditures to maintain the plant as a viable and effective competitor in the domestic steel market.

An Order consistent with the foregoing has been entered this day.

/s/
JOHN H. PRATT
United States District Judge

Date: December 5, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LTV CORPORATION, LTV STEEL COMPANY INC., and GULF STATES STEEL CORPORATION,
Plaintiffs,

v.

GULF STATES STEEL, INC., OF ALABAMA,
Defendant.

Civil Action
No. 91-1072

FILED Dec. 5, 1991

ORDER

Pursuant to the Findings of Fact and Conclusions of Law entered this day in the above entitled cause, it is this 5th day of December, 1991

ORDERED that

1. Defendant GSSI's claim for recoupment be granted for the following authorized expenditures made in correcting specific environmental violations which arose directly or indirectly out of the conduct of Business at the Gadsden plant on or before January 31, 1986:

(a) Authorized expenditures of $18,085,438 plus interest on said amount, as of July 31, 1991, of $2,371,353 (Findings of Fact Nos. 14, 15 and 16, Conclusions of Law Nos. 6 and 7), and

(b) Authorized and anticipated, but not fully incurred expenditures of $10,620,741 (Findings of Fact No. 17, Conclusions of Law No. 8).

2. Said recoupment shall not exceed the amount held in escrow subject to this Court's Order of June 21, 1991, with respect to the deposit of moneys pursuant to an Escrow Agreement attached to said Order.

3. Plaintiff LTV's claim for any unpaid balance allegedly due on the original purchase money note is denied *without prejudice*, subject to a determination of the amount, if any, presently due LTV on said note.

4. This Court shall retain jurisdiction until any remaining issues are concluded.

/s/
JOHN H. PRATT
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LTV CORPORATION, LTV STEEL COMPANY, INC., AND GULF STATES STEEL CORPORATION,
Plaintiff,

v.

GULF STATES STEEL, INC. OF ALABAMA,
Defendant.

Civil Action No. 91-1072
(Judge Pratt)

Filed
June 21, 1991
Clerk, U.S. District Court
District of Columbia

ORDER REGARDING DEPOSIT OF MONIES

Pursuant to Rule 67, Fed. R. Civ. P., the Motion of Gulf States Steel, Inc. ("GSSI") to Deposit Certain Monies, Memorandum of Points and Authorities in Support thereof, and upon consideration of argument presented to this Court on June 14, 1991,

IT IS HEREBY ORDERED:

1. Any remaining obligation of GSSI to LTV Corporation, LTV Steel Company, Inc. and Gulf States Steel Corporation (collectively "LTV") on the January 31, 1986 Promissory Note made by GSSI as consideration to purchase the Gadsden, Alabama steel mill, pursuant to this Court's Orders in *United*

States v. LTV Corp., Civil Action No. 84-0884 (D.D.C.), is hereby satisfied and paid in full, upon GSSI's deposit in escrow with the First National Bank of Chicago, pursuant to the Escrow Agreement attached hereto, the amount of $31,293,000.00 together with interest at the rate of 18-3/4 percent from February 1, 1991 through the date of the entry of this Order.

2. The terms of the Escrow Agreement, attached hereto, are incorporated into and made a part of this Order;

3. Upon such deposit, the accrual of any additional interest on the January 31, 1986 Promissory Note is terminated, as set forth above; and

4. Any and all disbursement of such escrowed monies including any interest earned thereon subsequent to the date of deposit, is subject to further Order of this Court.

/s/_____
Judge John H. Pratt
United States District Court

Entered: June 21, 1991

ESCROW AGREEMENT

THIS ESCROW AGREEMENT dated as of June 19, 1991 (this "Agreement") is among GULF STATES STEEL, INC. OF ALABAMA ("GSSI"), THE LTV CORPORATION, LTV STEEL COMPANY, INC. and GULF STATES STEEL CORPORATION (collectively "LTV"), and THE FIRST NATIONAL BANK OF CHICAGO, as Escrow Agent (the "Escrow Agent").

RECITALS

WHEREAS, LTV, LTV Steel Company, Inc. and Gulf States Steel Corporation have filed an adversary complaint in the United States Bankruptcy Court for the Southern District of New York against GSSI demanding payment upon a Note in the amount of $28,875,000.00 in principal and $2,418,281.00 in interest accrued as of February 1, 1991, for a total of $31,293,281.00, with interest accruing at the rate specified on the Note from February 1, 1991 (the "Proceeding"); and

WHEREAS, GSSI has filed an answer to the adversary complaint denying allegations and asserting defenses; and

WHEREAS, The United States District Court for the Southern District of New York on May 3, 1991 ordered a withdrawal of the reference of the adversary proceeding to the United States District Court for the Southern District of New York from the Bankruptcy Court, and then transferred the proceeding to the United States District Court for the District of Columbia; and

WHEREAS, at a preliminary conference, GSSI proposed that the amount demanded be deposited with a court as payment in full, and the bankruptcy court instead proposed that a sum be deposited in an escrow account and invested in accordance with its Order Approving Investment Guidelines dated September 22, 1986; and

WHEREAS, GSSI renewed its proposal to deposit the amount demanded in court as payment in full in the matter of *LTV Corporation, et al. v. Gulf States Steel, Inc. of Alabama*, CA No. 91-1072, and at a hearing held on June 14, 1991, the Hon. John H. Pratt approved the deposit, subject to his further orders, pursuant to an Order attached hereto and made a part hereof as Exhibit "1".

In consideration of the foregoing and other good and valuable consideration, the parties hereto agree as follows:

SECTION 1. DEPOSIT OF ESCROWED FUNDS

GSSI has agreed to deposit with the Escrow Agent in escrow the sum of Thirty-Three Million, Five Hundred Twenty-six Thousand, One Hundred Eighty-six Dollars ($33,526,186.00), plus the sum of Sixteen Thousand Seventy-Five and 32/100 Dollars ($16,075.32) per day after June 17, 1991 until the date Exhibit "1"(the Order) is entered (the "Initial Deposit", together with the proceeds of any investments thereof and all interest and income thereon, the "Escrowed Funds"). The Escrow Agent hereby acknowledges receipt of the Initial Deposit and agrees to establish and maintain a separate account therefor (the "Escrow Account").

SECTION 2. REPRESENTATIONS BY GSSI

GSSI represents and warrants that it has good and marketable title to the Initial Deposit, free and clear of all liens, charges and encumbrances whatever (other than as shall exist under this Escrow Agreement), and has good right, full power and authority to convey, transfer to the Escrow Agent for the uses and purposes in this Escrow Agreement set forth; and GSSI will warrant and defend the title thereto against all claims and demands whatsoever.

SECTION 3. INVESTMENT OF ESCROWED FUNDS

Pending application of the Escrowed Funds as contemplated in this Escrow Agreement, the Escrow Agent shall invest and reinvest the Escrowed Funds, from time to time during the term of the escrow in direct, interest-bearing obligations of the United States of America with maturities of 30 and/or 60 days (the "Obligations"). Interest and other earnings on the Obligations shall be added to the Escrow Account. Any loss incurred from an investment will be borne by the Escrowed Funds. Investment and reinvestment of the Escrowed Funds shall be made only in Obligations. The Escrow Agent shall not be liable for any losses or failure to receive any particular return in respect of any investment. The Escrow Agent is hereby authorized and directed to sell any or all of the escrowed funds investments and reduce them to cash, if necessary, to make disbursements hereunder without liability for any resulting losses thereon.

SECTION 4. DISBURSEMENT OF ESCROWED FUNDS

The Escrow Agent shall disburse the funds on deposit in the Escrow Account promptly upon receipt from LTV or GSSI of a copy of a final judgment or order of the United States District Court for the District of Columbia (the "Relevant Court"), certified by the clerk of such court or other appropriate official. A judgment or order under this Escrow Agreement shall not be deemed to be final until the time within which an appeal may be taken therefrom has expired and no appeal has been taken, or until the entry of a judgment or order from which no appeal may be taken.

SECTION 5. CONCERNING THE ESCROW AGENT

5.1. *Certain Duties and Responsibilities of the Escrow Agent:*

(a) The Escrow Agent undertakes to perform such duties and only such duties as are specifically set forth in this Escrow Agreement and no implied covenants or obligations shall be read into this Escrow Agreement against the Escrow Agent.

(b) In the absence of bad faith on the part of the Escrow Agent, the Escrow Agent may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Escrow Agent and conforming to the requirements of this Escrow Agreement; but in the case of any such certificates or opinions which by any provisions hereof are specifically required to be furnished to the Escrow Agent, the Escrow Agent shall be under a duty to examine the same to determine whether or not the execution and delivery thereof conform to the requirements hereof.

(c) No provision of this Escrow Agreement shall be construed to relieve the Escrow Agent from liability for its own gross negligence or willful misconduct, except that:

(1) This subsection shall not be construed to limit the effect of subsection (a) of this Section; and

(2) The Escrow Agent shall not be liable for any error of judgment made in good faith unless it shall be proved that the Escrow Agent was negligent in ascertaining the pertinent facts.

(d) No provision of this Escrow Agreement shall require the Escrow Agent to expend or risk its own funds or otherwise incur any financial liability in performance of any duty hereunder, or in the exercise of any rights or powers granted hereunder or by law if the Escrow Agent shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

(e) GSSI and LTV, jointly and severally, agree to indemnify and save harmless the Escrow Agent from and against all loss, liability and expense incurred in good faith and without gross negligence or willful misconduct on its part in the exercise or performance of any rights, remedies or duties under this Escrow Agreement.

(f) Whether or not herein expressly so provided, every provision of this Escrow Agreement relating to the conduct or affecting the liability of or affording protection to the Escrow Agent shall be subject to the provisions of this Section.

5.2. *Escrow Agent's Compensation, Expenses, etc.* GSSI, from time to time upon request, will pay the Escrow Agent reasonable compensation for its services hereunder as set forth in the attached Exhibit "2"and will pay or reimburse the Escrow Agent for all reasonable expenses and disbursements of the Escrow Agent hereunder, including, without limitation, the reasonable compensation and expenses and disbursements of the Escrow Agent's counsel and of agents not regularly in the Escrow Agent's employ.

5.3. *Certain Rights of the Escrow Agent.*

(a) The Escrow Agent shall not be responsible for paying or discharging any tax, assessment, governmental

charge or lien affecting the Escrowed Funds, or for the recording, filing or refiling of this Escrow Agreement nor shall the Escrow Agent be bound to ascertain or inquire as to the performance or observance of any of the covenants, conditions or agreements contained herein, and, except in the case of a default of which an officer in the Corporate Trust Department of the Escrow Agent has actual knowledge, the Escrow Agent shall be deemed to have knowledge of a default in the performance or observance of any of such covenants, conditions or agreements only upon receipt of written notice thereof from GSSI or LTV. The Escrow Agent shall promptly notify GSSI and LTV of any default of which the Escrow Agent has actual knowledge.

(b) The Escrow Agent makes no representation or warranty as to the validity, sufficiency or enforceability of this Escrow Agreement.

(c) The Escrow Agent may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, note or other paper or document believed by the Escrow Agent to be genuine and to have been signed or presented by the proper party or parties.

(d) Any request, direction or authorization by GSSI or LTV shall be sufficiently evidenced by a request, direction or authorization in writing, delivered to the Escrow Agent, and signed in the name of the company making the request, director or authorization by the President or any Vice President of that company.

(e) Whenever in the administration of this Escrow Agreement provided for herein, the Escrow Agent shall deem it necessary or desirable that a matter be proved

or established prior to taking, suffering or permitting any action hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by a certificate purporting to be signed by the appropriate officer of GSSI or LTV and delivered to a corporate trust officer of the Escrow Agent, and such certificate shall be full warrant to the Escrow Agent or any other person for any action taken, suffered or omitted on the faith thereof, but in its discretion the Escrow Agent may accept in lieu thereof other evidence of such fact or matter or may require such further or additional evidence as it may deem reasonable.

(f) The Escrow Agent may consult with counsel, appraisers, engineers, accountants and other skilled persons to be selected by the Escrow Agent, and the written advice of any thereof shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by the Escrow Agent hereunder in good faith and in reliance thereon.

(g) The Escrow Agent shall not be liable for any action taken or omitted by the Escrow Agent in good faith and believed by the Escrow Agent to be authorized or within the discretion or rights or powers conferred upon the Escrow Agent by this Escrow Agreement.

(h) The provisions of paragraph (c) to (h) inclusive of this § 5.3 shall be subject to the provisions of § 5.1 hereof.

5.4. *Showings Deemed Necessary by the Escrow Agent.* Notwithstanding anything elsewhere in this Escrow Agreement contained, the Escrow Agent shall have the right, but shall not be required, to demand in respect of withdrawal of any Escrowed Funds or any other action whatsoever within the purview hereof, any showings, certificates, opinions, appraisals,

or other information by the Escrow Agent deemed necessary or appropriate in addition to the matters by the terms hereof required as a condition precedent to such action.

5.5. *Status of Moneys Received.* All monies received by the Escrow Agent shall, until used or applied as herein provided, be held for the purposes for which they were received.

5.6. *Resignation of the Escrow Agent.* The Escrow Agent may resign and be discharged from the trusts created hereby by delivering written notice thereof to LTV and GSSI. Such resignation shall take effect on the date a successor Escrow Agent shall have been appointed and shall have accepted such appointment as provided in § 5.10.

5.7. *Removal of Escrow Agent.* The Escrow Agent may be removed at any time, for or without cause, by an instrument or instruments in writing executed by LTV and GSSI.

5.8. *Appointment of Successor Escrow Agent.* In case at any time the Escrow Agent shall resign or be removed or otherwise become incapable of acting, a successor Escrow Agent may be appointed by an instrument in writing executed by such successor Escrow Agent, LTV and GSSI. Each Escrow Agent appointed in succession of the Escrow Agent named in this Escrow Agreement shall be a trust company or banking corporation organized and in good standing under the laws of the United States of America or any state thereof, and having capital, surplus and undivided profits aggregating no less than $1,000,000,000.

5.9. *Successor Escrow Agent by Merger, Consolidation, etc.* Any corporation into which a corporation acting as Escrow Agent hereunder may be merged or with which it may be consolidated, or any corporation resulting from any merger or consolidation to which the Escrow Agent is a party, or any state or national bank or trust company in any manner succeeding to all or substantially all of the corporate trust business of a

corporation acting as Escrow Agent hereunder, shall automatically succeed to all of the rights and obligations of the Escrow Agent hereunder without further action on the part of any of the parties hereto.

5.10. *Acceptance of Appointment by Successor Escrow Agent.* Any new Escrow Agent appointed pursuant to any of the provisions hereof shall execute, acknowledge and deliver to LTV and GSSI an instrument accepting such appointment; and thereupon such new Escrow Agent, without any further act, deed or conveyance, shall become vested with all the estates, properties, rights, powers and trusts of its predecessor in the rights hereunder with like effect as if originally named as Escrow Agent herein; but nevertheless, upon the written request of LTV and GSSI, or the successor Escrow Agent, the Escrow Agent ceasing to act shall execute and deliver an instrument transferring to such successor Escrow Agent, upon the trusts herein expressed, all the estates, properties, rights, powers and trust of the Escrow Agent so ceasing to act, and shall duly assign, transfer and deliver any of the property and moneys held by such Escrow Agent to the successor Escrow Agent so appointed in its or his place.

SECTION 6. MISCELLANEOUS

6.1. *Amendments.* Any term, covenant, agreement or condition of this Agreement may be amended, upon the written consent of the parties hereto.

6.2. *Effect of Amendment or Waiver.* No such amendment or waiver shall extend to or affect any obligation not expressly amended or waived or impair any right consequent thereon.

6.3. *Notices.* All communications provided for hereunder shall be in writing and delivered or mailed by registered or certified mail or overnight air courier, or by facsimile communication confirmed by registered or certified mail or overnight air courier: (1) If to GSSI, to Gulf States Steel, Inc., 174

South 26th Street, Gadsden, AL 35904-1935, Attention: President, with a copy to The Brenlin Group, Inc. 670 West Market Street, Akron, OH 44303, Attention: James D. Van Tiem; (2) if to LTV, to Glenn J. Moran, Esq., Vice President and Group Counsel, The LTV Steel Company, Inc., 25 West Prospect Street, Cleveland, OH 44115; or (3) if to the Escrow Agent, to The First National Bank of Chicago, One North State Street, 9th Floor, Chicago, Illinois 60602, Attention: Corporate Trust Administration - Escrow, if by registered or certified mail, and at The First National Bank of Chicago, One First National Plaza, Suite 0126, Chicago, Illinois 60670, Attention: Corporate Trust Administration - Escrow, if by overnight courier, or at (312) 407-1708, if by facsimile communication, or to such other address as GSSI, LTV or the Escrow Agent may in writing designate.

6.4. *Successors and Assigns.* This Agreement shall be binding upon GSSI, LTV and the Escrow Agent and their respective successors and assigns and shall inure to the benefit of each thereof.

6.5. *Severability.* Should any part of this Agreement for any reason be declared invalid or unenforceable, such decision shall not affect the validity or enforceability of any remaining portion, which remaining portion shall remain in force and effect as if this Agreement had been executed with the invalid portion or unenforceable thereof eliminated and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this Agreement without including therein any such part, parts, or portion which may, for any reason, be hereafter declared invalid or unenforceable.

6.6. *Governing Law.* This Agreement shall be governed by and construed in accordance with Illinois law.

6.7. *Captions.* The descriptive headings of the various Sections or parts of this Agreement are for convenience only

and shall not affect the meaning or construction of any of the provisions hereof.

6.8. *Termination.* This Escrow Agreement shall terminate upon disbursement of the Escrowed Funds pursuant to Section [4] hereof. Any investments in the Escrow Account on the aforesaid termination date shall be liquidated and the proceeds thereof plus any cash balance in the Escrow Account shall be distributed pursuant to Section [4] hereof.

6.9. *Set-Off.* The Escrow Agent hereby agrees that it shall not assert, claim or endeavor to exercise any right of set-off or banker's lien against any Escrowed Funds or any items or proceeds thereof that come into its possession in connection with this Escrow Agreement.

6.10. *Recordkeeping; Accounting; Tax Returns.* The Escrow Agent shall keep accurate and detailed accounts of all investments, receipts and disbursements and other transactions hereunder. Within thirty days following the end of each calendar month, and either (i) the Escrow Agent's removal or resignation or (ii) the termination of the Escrow Agreement as provided herein, the Escrow Agent shall render to LTV and GSSI an accounting of its administration of the Escrow Agreement, including a description of all gains, income, losses and expenses during the month and on a calendar year basis, assets on hand at the end of the month, a description of all securities and investments purchased and sold during the month and other pertinent information.

IN WITNESS WHEREOF, Gulf States Steel, Inc. of Alabama has caused this Escrow Agreement to be executed on its behalf by its _____ and attested by its _____ Secretary, on this _____ day of _____, 1991, and the LTV Corporation has caused this Escrow Agreement to be executed on its behalf by its _____ and attested by its _____ Secretary on this _____ day of _____, 1991.

GULF STATES STEEL, INC.
OF ALABAMA

By_____
Its_____

ATTEST:

By_____
Its _____

THE LTV CORPORATION

By_____
Its_____

ATTEST:

By_____
Its _____

Escrow Agreement accepted
this _____ day of _____, 1991:

THE FIRST NATIONAL
BANK OF CHICAGO
as Escrow Agent

By_____
Its_____

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LTV CORPORATION, et al.,

Plaintiffs,

v.

GULF STATES STEEL, INC. OF ALABAMA,

Defendant.

Civil Action No. 91-1072

ORDER

On June 14, 1991 this Court entertained oral argument from plaintiffs (collectively, "LTV") and defendant Gulf States Steel, Inc. of Alabama ("GSSI") on LTV's motion for summary judgment. After considering oral argument, all the briefs filed before and after the hearing, and the entire record of the case, we reach the following conclusions:

1. As the Court stated at the hearing on June 14, the words "any liability or obligation" in paragraph 9.1(a)(ii) of the Agreement of Purchase and Sale of Assets ("Asset Agreement") signed by the parties on January 31, 1986, includes environmental liabilities. Therefore, GSSI is not precluded as a matter of law from receiving a recoupment, no greater than the amount held in escrow pursuant to this Court's Order of June 21, 1991, for the costs it has incurred in correcting environmental violations that arose "directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability . . . ." *See* Asset Agreement, paragraph 9.1(a)(ii).

2. LTV is liable to GSSI for the cost of each corrective action that arose "directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability," whether or not LTV listed the need for that corrective action in Exhibit V. It is true that the version of paragraph 4.1.13 of the Asset Agreement which the parties signed on January 31, 1991 contains "a schedule of all corrective action which, *but for this transaction*, would have been required to be implemented by LTV respecting the Business for material compliance with current environmental laws and regulations . . . ." (emphasis added). Nevertheless, this language does not necessarily relieve LTV of the duty to indemnify GSSI for the cost of the corrective activities listed in Exhibit V. Paragraph 4.1.13 can be interpreted simply as requiring LTV to disclose to GSSI all of the corrective actions it would have had to take if it were still running the Gadsden plant. None of the Orders of this Court ever allowed LTV to relieve itself of liability for the environmental violations simply by listing them in Exhibit V. Therefore, we find that paragraph 4.1.13 does not exempt LTV from liability under the terms of the Asset Agreement.

3. Issues of material fact exist as to which, if any, of the corrective actions necessary to bring the Gadsden plant into compliance with environmental law arose "directly or indirectly out of the conduct of Business on or before the Closing Date which is not an Assumed Liability . . . ."

Therefore, it is by the Court this 1st day of July, 1991,

ORDERED that plaintiff LTV's motion for summary judgment is denied, and it is

ORDERED that the Court will hold an evidentiary hearing on August 26, 1991 to resolve the issues of material fact in this case, and it is

ORDERED that no later than fourteen (14) days after the entry of this Order, GSSI shall provide LTV with a statement as

to the costs or expense for which it will seek indemnification at the evidentiary hearing, and it is

ORDERED that no later than August 5, 1991 each party shall file with the Court, and serve counsel for the opposing party, a list of all potential witnesses, including expert witnesses, if any, showing the name, address thereof and subject matter areas of proposed testimony, and it is

ORDERED that no later than August 12, 1991, each party shall file with the Court, and serve counsel for the opposing party, a list of the exhibits it will offer in evidence, and it is

ORDERED that no later than August 19, 1991, each party shall file a schedule with the Court, and serve counsel for the opposing party, identifying the specific grounds for any objection to a proposed exhibit, and it is

ORDERED that the parties will not be allowed to use any exhibits or proffer testimony of witnesses at the hearing, not identified as required herein, and it is

ORDERED that no later than August 19, 1991 each party shall file with the Court, and serve counsel for the opposing party, a memorandum addressing any contested legal issues, and it is further

ORDERED that no later than September 8, 1991 each party shall file proposed findings of fact and conclusions of law and a proposed hearing order.

/s/

JOHN H. PRATT
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA
Civil Division

THE LTV CORPORATION, LTV STEEL COMPANY, INC. and GULF STATES STEEL CORPORATION,
Plaintiffs,

v.

GULF STATES STEEL, INC. OF ALABAMA,
Defendant.

Civil Action No. 91-1072
(Judge Pratt)

Filed August 6, 1992
Clerk, U.S. District Court
District of Columbia

FINAL JUDGMENT

Pursuant to the August 4, 1992 mandate of the Court of Appeals, it is hereby

ORDERED, ADJUDGED, AND DECREED that any and all amounts held in escrow pursuant to this Court's Order of June 21, 1991 shall be paid forthwith to LTV; and it is further

ORDERED, ADJUDGED, AND DECREED that an additional judgment is entered in favor of LTV and against GSSI for $4,959,877.64, representing the difference between the actual earnings of the escrow fund and interest at the rate of 18-3/4% on the sum of $31,293,281.00 between June 21, 1991 and August 6, 1992; and it is further

ORDERED, ADJUDGED, AND DECREED that an additional judgment is entered in favor of LTV and against GSSI for $2,180.46, representing LTV's bill of costs on appeal; and it is further

ORDERED, that the Court reserves jurisdiction of this case until all remaining matters are concluded.

Dated: August 6, 1992

JOHN H. PRATT
United States District Judge

cc.: Guy Miller Struve
Karen E. Wagner
Philip Ransom Schatz
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017

Jerome G. Snider
Davis Polk & Wardwell
1300 I Street, N.W.
Washington, D.C. 20005

Susan G. Braden
Anderson Kill Olick & Oshinsky
2000 Pennsylvania Avenue, N.W., Suite 7500
Washington, D.C. 20006

Richard T. Cunningham
Amer Cunningham Brennan
159 South Main
6th Floor Society Building
Akron, Ohio 44308

Betty Southard Murphy
Baker & Hostetler
1050 Connecticut Avenue, N.W., Suite 1100
Washington, D.C. 20036

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

THE LTV CORPORATION, LTV STEEL COMPANY, INC. and GULF STATES STEEL CORPORATION,
Plaintiffs,

v.

GULF STATES STEEL, INC. OF ALABAMA,
Defendant.

Civil Action No. 91-1072
(Judge Pratt)

Filed August 6, 1992
Clerk, U.S. District Court
District of Columbia

ESCROW DEPOSIT RELEASE ORDER

Inasmuch as the United States Court of Appeals for the District of Columbia Circuit has directed that this Court enter a final judgement releasing all monies deposited in the escrow deposit fund subject to this Court's June 21, 1991 Order for immediate delivery to plaintiffs ("LTV") pursuant to the first ordering paragraph of the Final Judgment, entered by this Court on August 6, 1992, pursuant to the June 12, 1992 decision and August 4, 1992 mandate of the Court of Appeals in Civil No. 92-7001, in favor of LTV and against defendant ("GSSI"), and GSSI consenting thereto, but without waiver or release of and with the specific reservation by GSSI of its right to petition the

Supreme Court for a writ of certiorari as to the June 12, 1992 decision and August 4, 1992 mandate of the Court of Appeals and, if GSSI prevails, to seek a return to GSSI of all monies paid to LTV hereunder, it is this 6th day of August 1992 ORDERED that:

1. the First National Bank of Chicago, as Escrow Agent, is directed to deliver to LTV the entire escrow deposit fund, subject to this Court's June 21, 1991 Order; and

2. upon release of the entire escrow deposit fund to LTV, the Escrow Agent shall be discharged from any further duty to or claim from any other party for this court-ordered release and payment to LTV; and

3. all monies released and delivered to LTV from this escrow deposit fund shall be applied in satisfaction of the first ordering paragraph of the final Judgement, entered on August 6, 1992, in favor of LTV and against GSSI, pursuant to the June 12, 1992 decision and August 4, 1992 mandate of the Court of Appeals; and

4. GSSI's right to petition the Supreme Court for a writ of certiorari as to the June 12, 1992 decision and August 4, 1992 mandate of the Court of Appeals is hereby reserved without waiver or release; and

5. if GSSI prevails after a petition for a writ of certiorari to the United States Supreme Court as to the June 12, 1992 decision and August 4, 1992 mandate of the Court of Appeals, GSSI shall be entitled to seek a return to GGSI of monies paid to LTV hereunder.

Dated: August 6, 1992

/s/_____
John H. Pratt
United States District Judge

cc.: Guy Miller Struve
Karen E. Wagner
Philip Ransom Schatz
Davis Polk & Wardell
450 Lexington Avenue
New York, New York 10017

Jerome G. Snider
Davis Polk & Wardell
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6th Floor Society Building
Akron, Ohio 44308

Betty Southard Murphy
Baker & Hostetler
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

CHATEAUGAY CORPORATION REOMAR, INC.
THE LTV CORPORATION, et al.,

Debtors.

THE LTV CORPORATION, LTV STEEL COMPANY, INC. and GULF STATES STEEL CORPORATION,

Plaintiffs,

- v -

GULF STATES STEEL, INC.

Defendant.

In Proceedings for A Reorganization Under Chapter 11
Case Nos. 86 B 11270 Through 86 B 11334 (BRL)
Inclusive, 86 B 11402 (BRL) and 86 B 11464 (BRL)

91 Civ. 1826 (LLS)
Adv. Proc. No. 91-5110A

ORDER

Due consideration having been had, and it sufficiently appearing that this adversary proceeding poses issues involving application of the environmental protection laws to the condition of the Gadsden facility and the provisions and intent of Judge Pratt's judgment and subsequent orders—

1. This court's referral of this proceeding (Adv. Proc. No. 91-5110A (BRL)), is withdrawn;

2. In the interest of justice and in deference to its retention of jurisdiction in Article XIII of the August 2, 1984 final judgment entered by the United States District Court for the District of Columbia (per Hon. John H. Pratt, U.S.D.J.) in *United States of America v. The LTV Corporation, et al.* Civil No. 84-0884, this proceeding is respectfully transferred pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the District of Columbia for such further proceedings as that court sees fit;

3. The application of Gulf States Steel, Inc. for leave to deposit money in this court's registry is denied without prejudice to a similar application before the United States District Court for the District of Columbia; and

4. The motion of the State of Alabama to intervene or file papers as an amicus curiae is granted, only to the extent that its papers were received and considered in support of the motion to withdraw and transfer.

So ordered.

DATED: New York, New York
May 3, 1991

/s/
LOUIS L. STANTON
U. S. D. J.

APPENDIX I

[¶ 66,133] United States v. The LTV Corp., Jones & Laughlin Steel Inc., J & L Specialty Steels, Inc., and Republic Steel Corp.

U.S. District Court, District of Columbia. Civil Action No. 84-884. Entered August 2, 1984 (Competitive impact statement and other matters filed with settlement: 49 *Federal Register* 13603, 29288).

Case No. 3168, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions-Steel Merger-Partial Divestiture-Long-Term Supply Contract-Public Interest-Foreign Competition-Efficiencies-Consent Degree.- The merger of the second and sixth largest U.S. steel producers was permitted by a consent decree requiring the prompt divestiture of two plants acquired in the transaction and the offering of a long-term supply contract to the purchaser of one of the plants to enable it to compete effectively. The decree was approved as being in the public interest, over the objections of other firms in the industry and a union. The post-merger Herfindahl-Hirschman Indices for two steel product markets would vary from about 1000 to 1100, which did not deviate significantly from the 1982 Department of Justice Merger Guidelines. Moreover, these indices did not include foreign imports, which have had and will continue to have some unquantifiable impact on domestic prices, and thus might have exaggerated the extent of concentration in the U.S. market. The U.S. steel industry was in a weakened and deteriorating condition, and the purpose of the merger was to achieve cost savings through increased efficiencies to enable the surviving company to compete more effectively both domestically and in the export market.

See ¶ 4285, 4325.27, 4365.52.

For plaintiff: J. Paul McGrath, Asst. Atty. Gen., Helmut F. Furth, Mark Leddy, John W. Clark, Frank N. Brentkover, Eric F. Kaplan, J. Robert Kramer, II, Thomas C. Black, and Katherine R. Curtis, Attys., Antitrust Div., Dept. of Justice, Washington, D.C. **For defendants:** Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., for LTV Corp., Jones & Laughlin Steel Inc., and J & L Specialty Steels, Inc.; Jones, Day, Reavis & Pogue, Washington, D.C., for Republic Steel Corp.

Memorandum Opinion

PRATT, D.J.: This matter is now before the court upon the parties, request that the proposed Final Judgment stipulated to by plaintiff and defendants[1] on March 21, 1984 be entered pursuant to the provisions of the Anti-Trust Procedures and Penalties Act (APPA), the so-called Tunney Act. 15 U.S.C. § 16(b)-(h) (1976).

A. Factual Background

1. The Complaint

Together with the stipulation, plaintiff on March 21, 1984 filed a complaint against defendants asking for injunctive relief to prevent the carrying out of a purchase agreement executed by LTV and Republic on September 28, 1983. As a result of that agreement, Republic would be merged into LTV through an exchange of common and preferred stock valued at $770 million at the time of the announcement. The complaint charges that this proposed acquisition may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. According to the complaint, it may do so in the following ways, among others:

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[1] The defendants are LTV Corporation, Jones & Laughlin Steel, Incorporated, J & L Specialty Steels, Inc., and Republic Steel Corporation. Hereinafter "LTV" will refer to the first three defendants collectively. Jones & Laughlin Steel Incorporated (hereinafter J & L) and J & L Specialty Steels, Inc. (hereinafter J & L Stainless) are the wholly owned subsidiaries of LTV.

a. Competition in carbon and alloy hot rolled sheet and strip, and alloy cold rolled sheet and strip and stainless cold rolled sheet and strip may be substantially lessened; and

b. Concentration in the manufacture and sale of carbon and alloy hot rolled sheet and strip, carbon and alloy cold rolled sheet and strip and stainless cold rolled sheet and strip will be substantially increased.

Complaint, p. 16.

The complaint seeks both a permanent injunction and a judgment that the proposed acquisition represents a violation of Section 7 of the Clayton Act. The complaint reflects the position of the Department of Justice (DOJ) on February 15, 1984 when it announced its opposition to the defendants' 4 1/2 month-old merger agreement. In its press statement of that day, the DOJ stated, in pertinent part:

> After an exhaustive investigation of the proposed deal, we concluded that the merger would sharply increase concentration in critical parts of the steel industry where only a few domestic companies compete. We concluded that the increased competition would be unacceptably high under the standards contained in the Departments' merger guidelines[2] and under the applicable law. On that basis we have decided to oppose the merger.

At the same time, the DOJ indicated that it was willing to consider alternatives to the proposed merger.

2. *The Events Occurring Between February 15, 1984 and March 21, 1984.*

Immediately following the February 15, 1984 announcement, the DOJ and its Anti-Trust Division came under sharp criticism from Commerce Secretary Malcolm Baldridge and United States Trade Representative William Brock. There

[2] The 1982 Merger Guidelines were superseded by Revised Merger Guidelines on June 14, 1984.

followed a period of intense negotiation between the parties about alternative solutions to the problem. As reflected in the certifications filed pursuant to 15 U.S.C. § 16(g) of the APPA by LTV and Republic on April 2, 1984 and April 3, 1984, respectively, defendants met several times with the DOJ between March 5 and March 21, 1984 concerning the pending transaction and kept Mr. Baldridge regularly informed as to the status of the discussions with the DOJ. They also discussed with Mr. Brock the matter of an alleged voluntary restraint agreement with the Japanese and the impact on domestic prices of Japanese imports and the European Economic Community Arrangement (EEC). All these conversations took place in face-to-face meetings or by telephone. Communications made solely by counsel of record with the Attorney General or with employees of the DOJ alone were not required to be reported. No written communications were reported. In response to demands from Cyclops Corporation and Wheeling-Pittsburgh Steel Corporation, participants in this proceeding, for "documents which the United States considered determinative in formulating" the proposed Final Judgment, the DOJ responded that it did not possess such determinative documents and hence could not produce them.

However characterized, the DOJ's treatment of this problem plainly was, and continues to be, a matter of extreme interest to other parts of the Executive Branch, and we can only speculate as to the nature and extent of any inter-departmental communications.[3] This deep concern underscores that the public

[3] On May 8, 1984, counsel for Cyclops attempted to obtain from the Department of Commerce, under the Freedom of Information Act, all of its documents relating to the proposed merger. In its response, Commerce listed 18 documents concerning its activities on the merger which it declined to produce under the deliberative process exemption of FOIA. 5 U.S.C. § 552(b)(5). Comments by Cyclops Corporation, Ex. A. On May 1, 1984, this court, after hearing, denied the requests of Wheeling-Pittsburgh of April 6, 1984 and of Cyclops of April 23, 1984, for the production of documents concerning the proposed merger.

interest determination to be made by this court implicates not only the competitive impact of such a judgment upon those immediately concerned, but also broad considerations of public policy having to do with the impact of the entry of such a judgment upon the overall economy and the public generally.

3. The Terms of the Proposed Final Judgment filed March 21, 1984

The terms of the proposed Final Judgment are phrased in the conventional language of such settlements and it is not necessary at this juncture to go into great detail describing the numerous protective provisions which are customarily to be found. In summary, the DOJ agrees to consent to the acquisition by LTV of Republic on condition that two Republic plants, one at Gadsden, Alabama, and the other at Massillon, Ohio, be divested. "Prompt and certain divestiture is the essence of the agreement . . ." according to the preamble (p. 1). The purchasers are required to demonstrate to the DOJ or, if the DOJ objects, to the court, that (1) the purchase is for the purpose of competing effectively and (2) that the purchaser or purchasers have the managerial, operational and financial capability to compete effectively. The divestiture of each facility is required to take place within six months of the date of the judgment but no later than December 1, 1984. They are to be accomplished free and clear of all mortgages and encumbrances including pension and termination rights which shall continue to be the obligation of the defendants. In addition, the purchaser of Massillon is to receive from defendants a long-term contract to supply the purchaser with stainless steel hot bands on such terms as to enable the purchaser to compete effectively in the manufacturer of cold rolled stainless steel and strip. In the case of Gadsden, the defendants, at purchasers' request, agree for 6 months to sell for use at Gadsden certain necessary raw materials. In each case, the purchaser agrees to operate the facility acquired as a viable and ongoing business. If the divestitures do not take place

within the specified period, the court, on the application of the DOJ shall appoint a trustee to effect the divestitures.

The adequacy of such divestitures in meeting DOJ's original February 15, 1984 objections to the merger, forms the basis of the participants' criticisms, and is central to our determination of whether the entry of this judgment is in the public interest.

4. The Competitive Impact Statement

On March 22, 1984, the DOJ submitted to the court a Competitive Impact Statement as required by § 2(b) of the APPA, 15 U.S.C. § 16(b).[4] After describing the history of the proceeding, the three product markets specified in the complaint, and the nature of ultimate use of each product, it sets forth the 1983 market shares of each defendant in each of the three product markets as follows:

(a) Cold and alloy hot rolled sheet and strip:

J & L - 12.6% (2nd largest)
Republic - 8.2% (6th largest)

(b) Cold and alloy cold rolled sheet and strip:

J & L - 13.5% (2nd largest)
Republic - 8.4% (7th largest)

As the result of the merger, LTV would be the largest producer of carbon and alloy hot and cold rolled sheet and strip.

(c) Stainless cold rolled sheet and strip:

J & L - 37.5% (largest)
Republic - 9.9% (4th largest)

It would also be the largest producer of stainless cold rolled sheet and strip.

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[4] As required by 15 U.S.C. § 16(b), the entire text of the proposed Final Judgment, the Competitive Impact Statement, the stipulation between the parties and an introductory explanation of the nature of the proceedings and the provisions for public comments were published in the *Federal Register* on April 5, 1984, 49 Fed. Reg. at 13603-09.

In calculating the effect of the merger on market concentrations, the Statement recognized that imports can have an important competitive effect on these markets, but pointed out certain trade restrictions applicable to imports from the EEC (percentage quota agreement on steel products) and from Japan (voluntary limitation on steel products). All domestic shipments and capacity and all imports of relevant products-except those from EEC and Japan-were included in its measurements of the degree of concentration. Thus defined, the original merger would increase the Herfindahl-Hirschman Index (HHI)[5] in hot rolled carbon and alloy strip from 871 to 1047; in cold rolled carbon and alloy strip from 953 to 1146; and in stainless cold rolled sheet and strip from 2190 to 2898.

The proposed Final Judgment, according to the Impact Statement, would scale down the original merger proposal by requiring the complete divestiture of Republic's Gadsden and Massillon steel mills within six months of the date of the proposed Final Judgment. The purchaser is required to be one who can and will operate the same as a viable and ongoing business which can compete in its area of steel production. It is provided that a trustee will be appointed if the sale cannot be achieved within five months but no later than November 1, 1984. In its description of the divestitures, the Statement generally tracts the provisions of the proposed Final Judgment.

In perhaps the most significant portion not covered by the proposed final judgment, the Statement discusses the alterna-

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[5] The Herfindahl-Hirschman Index, which was recently employed in developing the Department's revised merger guidelines, is a measure of seller concentration in a market. 1982 Merger Guidelines, 2 Trade Regulation Reports (CCH) ¶ 4,500 at 6,881-2. It is calculated by squaring the percentage market share of each firm in the market and then adding those squares. It is arguably a more accurate measure of market concentration than two-firm or four-firm concentration ratios, which merely are sums of the market shares of those firms, because it takes into account both the number and size distribution of all sellers in a market.

tives that were considered and rejected. In the case of Gadsden, which is not one of the largest carbon and alloy sheet facilities operated by defendants, divestiture of this mill will reduce the increase in market concentration as measured by the HHI by almost one-third. That fact, combined with the financial condition of defendants and possible efficiencies resulting from the merger, led to the conclusion that the merger as restructured would not be anti-competitive. In the case of Massillon, it is claimed that the divestiture would entirely eliminate any increase in concentration in cold rolled stainless sheet and strip, since all of Republic's production of such product is located in Massillon. To assure the economic viability of the divested plant, the Statement indicates that the proposed Final Judgment provides that defendants, under a long-term contract, will supply to the purchaser stainless hot rolled sheet and strip. Much of that supply will come from LTV's Midland, Pennsylvania plant, a high quality and low cost producer. After considering the divestiture of Midland, an integrated stainless steel mill, in lieu of Massillon, it was concluded that the divestiture of Massillon in combination with the long-term supply commitment from LTV would be sufficient to prevent undue concentration in the stainless cold rolled sheet and strip market.

Finally, in order to prevent the exchange of pricing and production information among competitors in the domestic steel industry, defendants are prohibited from participating in the exchange of such information through the American Iron and Steel Institute (AISI) for a period of ten years. According to the Statement, the Final Judgment would also not require the divestitures to take place prior to the consummation of the merger. This departure from the government's previous policy of "fix it first" was based on the delays which had occurred after the original agreement to merge, the alleged deleterious effects of further delay, and the assurances of prompt divestiture made by defendants.

B. Public Comments of the LTV-Republic Merger and the Department's Responses

Following the publication in the Federal Register on April 5, 1984 of the proposed Final Judgment and the Competitive Impact Statement, written comments were filed within the statutory 60-day period and also published in the Federal Register.[6] We have reviewed the four comments submitted, as well as the DOJ's and defendants' responses thereto. 15 U.S.C. §16(f)(4). We turn now to these comments.

1. Cyclops Corporation (Cyclops)

Cyclops opposes entry of the proposed Final Judgment only as it relates to stainless steel. It focuses its attention on the divestiture of Massillon, Republic's sole producer of stainless cold rolled sheet and strip.

Cyclops holds a 3% share of this market, one of the three product markets cited in the complaint. As shown previously, LTV (J&L Specialty Steels, Inc.) is the largest producer of stainless (37.5%) and Republic is fourth in size (9.9%). Cyclops presents two arguments why the proposed merger is contrary to the public interest. First, it contends that the proposal violations [sic] Section 7 of the Clayton Act by lessening competition, a condition which the Massillon divestiture would not remedy. Second, it maintains that the proposed merger is contrary to public policy limiting foreign imports. Thus, Cyclops, as a buyer of hot bands, asserts it is threatened by the lessening of competition among sellers of hot bands and that Massillon, for

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[6] As required by 15 U.S.C. § 16(b), all comments received and the DOJ's responses thereto were published in the Federal Register on July 19 and July 20. In compliance with 15 U.S.C. § 16(c), a summary of the proposed consent decree and the Competitive Impact Statement, and information concerning the filing of comments and the availability of documents for public inspection was published in The Washington Post on April 5 through April 11, 1984 inclusive.

a variety of reasons, will not prove a viable competitor in stainless cold rolled sheet and strip.

The government, by way of response, asserts that Cyclops will not lack sources of supply for hot bands after the Massillon divestiture. It points out that Cyclops does not purchase hot bands from Republic—which sells virtually no hot bands to anyone—and that LTV's Midland plant, even after supplying Massillon, has excess capacity to meet Cyclops' needs. So too do Armco, Allegheny Ludlum, and Washington, have such excess capacity.

Despite the provision that LTV enter into a ten-year contract with the purchaser of Massillon to supply hot bands on favorable terms—a timeframe which Cyclops regards as inadequate—Cyclops raises multiple objections to that arrangement. First, Massillon's present productive capacity and market will be taken over by LTV, which has access to Massillon's customer lists. Second, Massillon will be subject to an LTV price freeze due to LTV's increasing the price of hot bands from Midland, the purchaser's disadvantage of having to pay LTV's 10% mark-up under the supply contract, and Massillon's general non-competitiveness (its plant is antiquated and requires expensive capital improvements). In sum, according to Cyclops, divestiture of Massillon's productive capacity will not result in a corresponding divestiture of Massillon's present market share. As a result, the anti-competitive effects of the original merger proposal will not be eliminated. As an alternative, Cyclops proposes that LTV's Midland plant be divested, and evinces an interest in acquiring that facility.

The government challenges all of these claims, stating its understanding that Massillon, despite its need for modernization, is profitable, whereas Republic is not. According to the government, Massillon can also be quickly sold and operate at a profit. As to LTV's taking over Massillon's customers with the help of its excess capacity, the government points out that

LTV has not yet succeeded in doing so. It discounts Cyclops' criticism concerning the alleged inadequacies of the long-term supply contract. It emphasizes that Republic's entire interest in the relevant product market of cold rolled stainless sheet and strip will be divested, and that LTV's present level of concentration will consequently remain the same. The government also dismisses as unlikely a purchase by a foreign steel company having its own supply of hot bands, due to the number of interested inquiries from domestic companies concerning the purchase of Massillon. Admitting the applicability of anti-dumping laws, the DOJ denies that there is any public policy limiting either foreign imports or the ownership of United States manufacturing plants by foreign suppliers. The government considered the divestiture of Midland but rejected such an alternative as unnecessary in view of Massillon's divestiture and the injunctive provisions designed to ensure its competitive viability.

2. Wheeling-Pittsburgh Steel Corporation (W-P)

W-P's opposition is directed against the proposed Final Judgment as it relates to the other two product areas listed in the complaint: hot and cold rolled carbon and alloy sheet and strip. W-P is the eighth largest steel producer in the United States. It is one of the smallest integrated producers, with about 3% of domestic capacity. On the other hand, LTV and Republic, when merged, would occupy over 20% of both product markets. Objections to the proposed merger are straight-forward. First, as a horizontal merger of the 2nd and 6th largest steel producers in an industry which is already highly concentrated, the merger violates Section 7 of the Clayton Act and will lead to possible predatory pricing and restriction of credit. Second, the proposed divestiture of Gadsden does not remedy the violation.

With respect to the matter of market concentration, W-P points out that the original merger proposal, which is the subject of the complaint, would cause increases in the HHI as follows:

carbon and alloy *hot* rolled sheet and strip
from 1013 to 1219

carbon and allow *cold* rolled sheet and strip
from 1104 to 1330.

The proposed Final Judgment with the divestiture of the Gadsden plant would, according to the DOJ estimates, reduce the increase in concentration by approximately one-third. In the case of hot and cold rolled carbon and alloy strip, the HHI would be approximately 1000 and 1100, respectively, with increases in each market of less than 150.[7] W-P correctly points out that both the original merger and the scaled-down proposal conflict with the DOJ's 1982 Merger Guidelines. The latter consider a transaction as presumptively illegal if the HHI is in the post-merger range of 1000-1800 and the merger will increase the HHI by over 100 points.

On another matter, W-P asserts that the divestiture of Gadsden will not mitigate the adverse effect of the merger on market competition for several reasons. First, assuming Gadsden can be successfully sold and operated at or near capacity, there is still, as pointed out above, an HHI level of concentration in excess of the guidelines. Second, there is substantial doubt that Gadsden can be sold and operated as an effective competitor in the market for hot and cold rolled carbon and alloy sheet and strip. W-P supports this assessment of Gadsden's future viability by reliance on quoted comments from a number of influential sources, including spokesmen for the merging parties, the trade and public press, and industry analysts. The shutting down in 1982 of certain portions of the Gadsden facility, current problems with air pollution, rejection of a proposal for investment in new equipment, and the geographic remoteness from customers located in the Great

[7] The original merger HHI's calculated by the DOJ were increased by 176 to 1047 in hot rolled carbon and alloy steel and by 193 to 1146 in cold rolled carbon and alloy.

Lakes Region are cited as examples of the problems facing Gadsden.

If a buyer cannot be found within a year, the parties to the merger are not obligated to continue to operate the mill pending a sale. W-P argues that, in the case of Gadsden, divestiture prior to the merger should have been made a condition precedent, and that the DOJ's departure from its normal "fix it first" policy is not justified under the circumstances of this case but is inadequately explained. W-P suggests that the divestiture of some plant other than Gadsden is necessary, and that, at the very least, the DOJ should be ordered to comply with its "fix it first" policy. The merger also cannot be justified in W-P's view, for reasons of cost efficiencies, which Mr. McGrath discounted in his February 15, 1984 statement rejecting the original proposal, or for reasons relating to the "failing firm" defense on which neither of the defendants relies. W-P finally asserts that there is a close political connection between the DOJ's shift in approving the merger and the United States Trade Policy opposing quotas on imports of foreign steel.

In responding to W-P's comments, the DOJ explains the context of the government's decision. As restructured, the merger HHI Indices would not be increased significantly above the minimum levels at which the DOJ would, under the 1982 guidelines, be "more likely than not" to challenge a merger. Conceding that imports could not be completely ignored, the DOJ does not include, in computing the size of the domestic market, imports from the EEC or Japan, the two largest sources of imports. Those imports were subject to voluntary quotas or other limitations. In the event of a trial, the DOJ anticipates that at that time, the defendants would seek to include in their calculations all imports at their present levels. That would have the effect of reducing the HHI Indices for hot and cold rolled sheet and strip below 1000. In addition, the DOJ would expect the defendants to assert as an affirmative defense the fact that

both LTV and Republic had suffered substantial losses in 1982 and 1983—losses which are continuing up through the present quarter of 1984. The defendants would also point to significant savings and operating efficiencies resulting from the merger. The government cannot predict the outcome of such a prosecution. The proposal is admittedly a compromise reflecting these uncertainties. It was asserted also that the recent abandonment of a pending merger between United States Steel and National Steel, which would have brought together two companies controlling 50% of the domestic sheet market, made it easier for the government to reach this compromise.

As for the divestiture of Gadsden, which currently produces 15% to 20% of Republic's total sheet production, the DOJ asserts that this action will reduce the HHI in hot and cold rolled sheet and strip to 1006 and 1091, respectively. The government further understands that considerable interest has been manifested on the part of potential buyers, particularly since the buyers would not have to assume the burden of an unfavorable iron ore contract. Among such potential buyers would likely be foreign producers threatened by substantial restrictions of imports. The government would not object to their entry.

In conclusion the government regards Gadsden as a saleable property, which can be sold to a qualified buyer and profitably operated as a viable competitor in the domestic market. It defends its failure to insist on the "fix it first" policy as justified by the deteriorating financial condition of the companies which would be aggravated by further delay. The maintenance of high levels of production with resulting lower prices during the deep depression of the past few years was not as W-P contends an example of predatory pricing on the part of the larger companies, but an effort to survive by attempting to cover fixed costs. Finally, while opposed to quotas on imports, the DOJ reached its decision on the merits of the proposed

settlement without regard to the Administration's policy regarding imports.

3. Bliss & Laughlin Steel Co. (BLS)

BLS objects to the proposed Final Judgment as drafted and asks that it be modified to require divestiture of Massillon's bar facilities as well as those producing stainless steel. BLS is a producer of gold finished bars and ranks third in bar market share behind LTV and Republic. It, unlike LTV and Republic, is a non-integrated producer, which much purchase hot rolled bars as its raw material. It claims the merger will have substantial anti-competitive effects in the cold finished and hot rolled bar markets due to the enhanced market position of LTV. Injury to BLS and other smaller competitors will result. Noting that the complaint has not challenged the effect of the merger on the bar market, BLS asserts that the increased concentration in the bar market is comparable to the increase in the HHI found unacceptable by the DOJ in the case of hot and cold rolled sheet and strip, and stainless. In the case of cold finished bars and hot rolled bars, the HHI shows an increase from 954 and 1232 to 1562 and 1832, respectively. BLS also urges that the entire Massillon facility be divested, including that portion devoted to the production of cold finished bars. That would eliminate in the bar market, as in stainless, any anti-competitive increase in concentration. According to BLS, there is nationwide cold finished bar market in which there are 48 U.S. producers. BLS produces a type and quality of steel bar suitable for a variety of special uses. Excluding imports, BLS is estimated to have 7.85% of this cold finished market in 1984, as compared with 34.97% for LTV if the proposed Final Judgment is approved. This represents an HHI of 1562—an increase of 608. Aside from this increase in the HHI, which under the 1982 Guidelines would "more likely than not" cause the DOJ to challenge the merger, the so-called "other factors" to be considered all increase the likelihood of a challenge. These are (1) the close

location of certain portions of the merging firms and the similarity of their products; (2) the fact that orders for the relevant product are frequent, regular and small relative to the total output of the typical firm (BLS being a typical producer of cold finished bars); and (3) the ready availability to competitors of detailed information about specific transactions, prices and output levels.

In addition, BLS objects to the proposed acquisition because of its effect on the hot rolled bar market, of which BLS is a customer. The merger would give LTV a total market share of 37.03% and would result in an HHI for hot rolled bars of 1832 — an increase in concentration of over 600 points. This would produce the same anti-competitive consequences as in the cold finished bar market discussed above, since LTV, due to its dominance, would be able to set the price for hot bars while simultaneously competing in the cold bar market. This, in turn, will have an adverse effect on BLS which, as a non-integrated producer, is a customer in the hot bar market. The entry of a number of "mini-mills" in the hot bar market is not a satisfactory answer, because of differences in methods of production. Those differences cause the quality of steel to vary from that produced by larger hot bar mills. The cold finished bar industry is only about 1.7% of the entire United States steel market and it would not prove economical for a non-integrated producer to build a mini-mill to supply raw materials for cold bar production. In BLS's view, the only satisfactory solution to the increased concentration in the cold finished and hot bar markets is the complete divestiture of Massillon's bar facilities which produced 75-80% of the total Republic bar product.

The DOJ's response to BLS's comments is based on both procedural and substantive grounds. Procedurally, the DOJ asserts that the BLS objections are not relevant to this proceeding since no violation stated in the complaint relates to the bar market, nor is that subject touched on in the proposed settlement

agreement. The Tunney Act states that in making its determination concerning whether the entry of the judgment is in the public interest the court must consider, among other things, (1) the competitive impact of the settlement, including termination of alleged *violations*; and (2) the impact on the public generally and an individuals alleging specific injury *from violations set forth in the complaint.* 15 U.S.C. § 16(e) (emphasis supplied).[8] The DOJ in its discretion did not address the issue of bar markets and, under such circumstances, the appropriate remedy is a private suit under Section 4.

On the substantive side, the DOJ disputes the BLS claim of undue concentration in the bar markets as measured by the HHI, asserting that its computation of market shares is substantially lower than that of BLS. It points out that the bar and sheet markets are considerably different, that there are many more bar producers than sheet producers, and that the nature of bar markets is changing under the growing influence of mini-mills (producing cold finished bars) which are pushing integrated competitors out of this business. A number of these mini-mills do not report shipments to the AISI, but, based on its calculations, the DOJ estimates that after the merger, the HHI in hot rolled and cold finished bar markets would be at or near 1000. The ability of large, integrated producers such as LTV and Republic to influence price competition in the market for cold finished bars and hot rolled bars after the merger is offset by diminished barriers of entry spearheaded by these new producers. There are now, according to BLS, 48 mini-mills in the cold bar market. As for the hot bar market, there were at least 31 producers of hot bars in 1982. If LTV decided to raise the price of hot bars, BLS could receive its supply of hot bars from one or more other hot bar producers. Accordingly, the

[8] "APPA under the circumstances of this case [does not] permit or require the Attorney General to assert additional claims not alleged at the outset of the case." *United States v. Mid-America Dairymen, Inc.*, 1977-1 TRADE CASES (CCH) ¶ 61,508 at 71,973, 71,979 (W.D. Mo. 1977).

DOJ concludes that the merger, as it affected the hot and cold bar markets, would not violate Section 7 of the Clayton Act.

4. The United Steelworkers of America (USA)

The USA states that it is not opposed to the merger but is concerned that the required divestitures of Massillon and Gadsden are "thinly veiled excuses for closing plants and laying off workers." It therefore opposes the divestitures, because in its view, the plants will be ultimately closed and jobs lost. For a number of reasons, the USA does not believe that either plant can survive as a divested entity. In the case of Massillon, USA states that the former is an antiquated facility in need of extensive capital improvements, and dependent on LTV for its supply of hot bands under the long term supply agreements. It is likely that Republic's hot rolling plant at Canton, Ohio will be phased out due to LTV's provision of Massillon's hot band requirements out of the Midland facility. As for the carbon steel mill at Gadsden, the steelmaking segment requires substantial investments which would prevent it, if divested, from functioning as a viable competitor. If Gadsden is not sold, but closed, 2,200 jobs will be lost.

The DOJ responds that the merger could not be approved without the divestitures and that the purpose of the proposed Final Judgment is to preserve these two plants as viable competitors in their respective markets. It does not anticipate that either plant will be closed and it would not approve the sale to any purchaser likely to close the mill after reaping short term profits. It recognizes that no one can guarantee that any mill will remain in operation indefinitely and that recent closings of steel mills and loss of jobs has occurred through the action of the steel companies themselves and not as the result of divestitures. It regards the proposed settlement as consistent with the goals of USA to preserve jobs.

5. Response of LTV and Republic to Comments on Proposed Final Judgment

The goal of these respondents, parties to the proposed Final Judgment, is "to place the transaction in its proper perspective and demonstrate that it is pro-competitive, does not violate the antitrust laws and that the proposed judgment is in the public interest." Response of LTV and Republic to Comments on Proposed Judgment, at 1.

With respect to the carbon and alloy steel markets, defendants contend that the merger will produce operating efficiencies which will enable the surviving company to be a more effective competitor in the world steel market. They point to the declining state of the United States steel industry due to shrinking consumption and growing imports. That decline has caused huge recurring losses, lack of funds for capital improvements, inefficient facilities and unutilized capacity. Defendants asserts that LTV during 1982 and 1983, lost approximately a half billion dollars before taxes in its carbon and alloy business. These are covered by cash advances which are expected to increase substantially in the next several years. Republic also finds itself in a similar weakened position, with pre-tax losses of $474 million in 1982 and $394 million in 1983. Defendants describe numerous changes which will enable the merged company to operate as a "more efficient, lower cost, competitive entity, and which are estimated to produce cost savings of $343 million or $27 per ton of steel. While the precise amount of these efficiencies is subject to dispute, it is claimed that they will be substantial, thus providing the entire rationale for the merger. There is no dispute that the merging companies have sustained heavy losses and are in a weakened financial condition. While neither the DOJ nor the companies have asserted the "failing company" defense, the basic fact of their current financial predicament is relevant to their ability to survive alone.

The present plight of the United States steel industry is attributed in no small part to the threat of foreign competition and to foreign imports which in 1982 accounted for 22% of the domestic market and now account for some 25% of that market. This has made the domestic industry less competitive at home and has produced plant closings with large losses of jobs. By failing to acknowledge that the relevant market is world-wide and that actual imports from Japan and the EEC should be included in calculating the HHI under the Merger Guidelines, the DOJ made a mistake when it determined that the merger as originally proposed was anti-competitive and monopolistic and violated the anti-trust laws. According to defendants, the HHI for hot rolled sheet and strip was actually 833 while for cold rolled sheet and strip it was 939. This contrasts with the DOJ HHI of 1047 and 1146. With the divestiture of Gadsden, the degree of concentration as measured by the HHI should be even less.

With respect to the stainless steel market, defendants argue that the requirement that Republic divest itself of Massillon leaves the market unchanged and will not result in increased concentration. Defendants also direct certain comments to the several objections of Cyclops concerning the viability of Massillon as a future competitor and Cyclops' ability to purchase hot bands for its cold rolled stainless product. These objections have been previously addressed in the DOJ's response to Cyclops' comments and will not be repeated.

To summarize the defendants' argument, the steel industry is in a state of severe depression. Separately, the defendants cannot generate funds for capital improvements in plant and equipment without which they cannot meet foreign competition. The merger will produce savings in the cost of operation and in the amounts otherwise necessary for capital improvement. The consolidation combines two weakened companies and will permit the merged company to function as an effective competitor

in the world market. Defendants urge that the proposed Final Judgment is in the public interest and should be approved.

C. Standard of Review

The standard of review of anti-trust consent decrees is established by Section 2 of the Tunney Act, which provides:

> (e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider —
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

According to the legislative history of the Tunney Act, the avowed purpose of the public interest determination requirement was to remedy the " 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department." To achieve this purpose, it required public disclosure of the reasons for, and terms of, proposed settlements with an opportunity for public comment as well as an express judicial determination that the proposal is in the public interest. H.R. Rep. No. 1463, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. Code Cong. & Ad. News 6535, 6538. See generally Note, "The ITT Dividend: Reform of Department of Justice Consent Decree Procedures,"

73 Col. L. Rev. 594 (1973) (discussing the public interest requirements of the Tunney Act and the impetus for changes in procedures for review of anti-trust consent decrees).[9]

The public interest is to be determined in the context of the anti-trust laws whose fundamental premise is the protection and safeguarding of free competition. The effect on competition of the proposed settlement is of paramount importance in the determination which we are required to make. Other factors, however, enter into the calculus. Any remedy should be framed with a view to causing the least possible injury to interests of the general public and relevant private interests. The court should consider the impact of the remedy in relation to other important public policies and avoid any unnecessary conflict or friction. It is not free, in making its public interest determination, to decide whether the settlement is the best that could have been reached or, if not, to substitute its own separate notions as to the proper remedy.

Finally, despite the fact that the 1974 Tunney Act appears to require a higher level of judicial scrutiny of consent decrees than was previously the case, it is clear that the Act was not intended to discourage settlement of government anti-trust suits.[10] H.R. Rep. No. 1463, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. Code Cong. & Ad. News at 6539 (quoting S. Rep. 298, 93d Cong., 1st Sess.). As with any form of settlement, the consent decree process saves the parties the considerable time and expense of litigation. In the particular context of anti-trust litigation, the consent decree mechanism permits the DOJ to spread its limited resources over more suits and, thus, achieve broader enforcement. In the current fiscal climate, the consent

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[9] For a more complete history of the Tunney Act, attention is directed to the opinion of Judge Harold Greene of this court in the AT&T case. *United States v. American Tel. & Tel Co., et al.* [1982-2 TRADE CASES ¶ 64,979], 552 F. Supp. 131, 148-49 (1982).

[10] It has been estimated that almost 80 percent of the anti-trust suits filed by the DOJ terminate in consent decrees. "The ITT Dividend" at 595 (1973).

decree mechanism plays a significant role in the DOJ's enforcement scheme.

Therefore, our function in reviewing anti-trust consent decrees is, as Senior Circuit Judge Bailey Aldrich has stated in an oft-quoted opinion,

> not ... *to determine whether this is the best possible settlement that could have been obtained,* if, say, the government had bargained a little harder. The Court is not settling the case. It is determining whether the settlement is within the reaches of the public interest. Basically . . . [we] must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. (emphasis supplied.)

United States v. Gillette Co. [1975-2 TRADE CASES ¶ 60,651], 406 F. Supp. 713, 716 (D. Mass. 1975). Accord *United States v. Agri-Mark, Inc.* [1981-1 TRADE CASES ¶ 63,992], 512 F. Supp. 737, 739 (D. Vt. 1981); *United States v. National Broadcasting Co., Inc.* [1978-1 TRADE CASES ¶ 61,842], 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); 2 P. Areeda & D. Turner, *Anti-Trust Law* § 330g, at 147-48 (1978). Although under our statutory authority, we are required to scrutinize closely all consent decrees, we are not unmindful that the power to negotiate the terms of any particular consent decree is lodged in the Executive Branch. *United States v. Associated Milk Producers, Inc.* [1975-1 TRADE CASES ¶ 60,326], 394 F. Supp. 29, 42 (W.D. Mo. 1975), aff'd [1976-1 TRADE CASES ¶ 60,826], 534 F.2d 113 (8th Cir.) cert. denied, 429 U.S. 940 (1976). It is in light of this background that this court has considered the foregoing submissions and makes the following determination as to whether the proposed settlement is "within the reaches of the public interest." *Gillette*, at 716.

D. Conclusion

On February 15, 1984, the DOJ rejected the original merger proposed by LTV and Republic as violative of Section 7 of the Clayton Act. This action provoked widespread criticism from other parts of the Executive Branch, including the Secretary of Commerce and President Reagan.

On March 21, 1984, the DOJ filed the present proposed Final Judgment which approved the merger on the condition that there be a divestiture of Republic's Gadsden, Alabama facility and that portion of the Massillon, Ohio plant which manufactures cold rolled stainless sheet and strip. According to the DOJ, the divestiture of Gadsden will reduce to acceptable levels the HHI market concentration in the two specified areas of carbon and alloy sheet. The DOJ asserts that the post-merger HHI in hot rolled carbon and alloy sheet will be reduced to approximately 1006 and in cold rolled sheet to 1091.[11] These reductions do not deviate significantly from the 1982 Merger Guidelines. In the case of Massillon, there will be no increase in the level of market concentration. The two plants are to be promptly divested by selling them to purchasers who will continue to manage and operate them as competitive and ongoing businesses. Cyclops and Wheeling-Pittsburgh, aside from complaining about the DOJ's abrupt "change of position," vigorously challenge the effectiveness of the divestitures in effecting reductions in market concentration. They claim that because of the age of the facilities involved and the need for extensive capital improvements, there will be an absence of interested buyers able to compete effectively. In the case of Bliss & Laughlin, the divestiture of Massillon is opposed, not for the reasons asserted by Cyclops, but because the divestiture should be broader and include Massillon's bar facility.

The DOJ supports its position that the merger does not produce an undue concentration of power in the relevant markets

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[11] Both of these computations exclude imports from Japan and the EEC.

by reliance on the HHI. While it is concerned about the weakened economic condition of the merging companies, it explicitly does not rely on the "failing firm" doctrine. It admits that the merger will yield operating efficiencies through lower costs and the utilization of unused capacity, but is unable to quantify the extent of such savings. It concedes the importance of foreign imports, but in determining the size of the domestic market, it has excluded both imports from Japan covered by a voluntary agreement, and imports within the EEC Arrangement stated to expire on December 31, 1985.

In making our determination as to the reach of the public interest, we are required to consider the positions of the interested parties as specifically expressed by them. We must, however, also consider these positions in the broader factual context about which there is no substantial dispute.

This context subsumes several vital issues. First, we live in a world of increasing international competition. In general terms, the high value of the American dollar and the lower costs of foreign manufacture have, sometime in combination with foreign subsidies, helped contribute to an unfavorable balance of trade.

Second, potential and actual foreign imports have a significant impact on domestic prices in determining the size of the relevant product market in steel. The extent of this impact is influenced by a number of factors which are beyond anyone's control, and which are difficult to measure and to predict. As previously noted, the present rates of exchange have affected entry of foreign imports into domestic markets, including steel. This trend can be somewhat counterbalanced by quotas, whether imposed by the United States or by the voluntary action of the importing country as in the case of Japan. At the same time, we are aware of the Administration's opposition to quotas on steel (including domestic-content legislation). This policy appears to be consistent with our long tradition as a trading nation of

relying on domestic exports to pay for foreign imports. We cannot predict whether this policy will continue to prevail.[12] It should be sufficient to say that foreign imports of steel, both present and future, have had and will have some unquantifiable influence on domestic prices. Foreign competition therefore must be included in determining the size of market shares and the degree of market concentration. Thus, the rigid application of the HHI, in measuring concentration in the domestic market may very well have a tendency to exaggerate the extent of such concentration.

Third, a basic United States industry — steel — continues to find itself in a weakened and deteriorating condition. The present plight and future prospects of LTV and Republic are no exception to this pattern. The purpose of the present merger is to achieve savings in cost through increased efficiencies which will enable the surviving company to compete more effectively both here and in the export market. We cannot predict that these efforts will succeed, but we can say with some certainty, that without an opportunity to improve their acute financial predicament, their future will indeed be bleak.

Finally, the proposed Final Judgment represents a compromise. The DOJ has no assurance that it will prevail at trial. Even if it were confident of prevailing, it could not predict whether the relief it would obtain would differ substantially from that encompassed by the present settlement. The savings to the parties in time as well as money would be substantial. We repeat that we are not at liberty to impose our notions about a proper remedy as would be true in the case of a trial with a finding of liability.

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[12] This policy, of course, is eclectic and subject to numerous exceptions. Only recently the International Trade Commission made a preliminary finding that would place important restrictions on imports of all hot and cold rolled sheet.

For all of the foregoing reasons, and after full consideration of the record, all the public comments received, the DOJ's and defendants' responses thereto, it is our determination that the proposed Final Judgment is in the public interest.

Final Judgment

PRATT, D.J.: Whereas, plaintiff, United States of America, having filed its Complaint herein on March , 1984, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

And Whereas, the defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, prompt and certain divestiture is the essence of this agreement and the defendants have represented to the plaintiff that the divestiture required below can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[Jurisdiction]

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II

[Definitions]

As used in this Final Judgment:

A. "LTV" means the defendant The LTV Corporation, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

B. "J&L" means the defendant Jones & Laughlin Steel Incorporated, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

C. "J&L Stainless" means the defendant J&L Specialty Steels, Inc., including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of them.

D. "Republic" means the defendant Republic Steel Corporation, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of them.

E. "Defendants" means LTV, J&L, J&L Stainless and Republic.

F. "Person" means any natural person, corporation, association, firm, partnership or other business or legal entity.

G. "Steel mill" means the manufacturing plant, real property, capital equipment, and any other interests, tangible assets or improvements associated with a facility for making steel products, but shall not include cash, cash equivalents, pre-paid expenses or accounts receivable.

H. "Gadsden" means the steel mill and coke batteries owned by Republic (as of March 21, 1984) located in Gadsden, Alabama; provided, however, that any purchaser of Gadsden

may elect not to purchase that portion of the mill related to coke and steel production.

I. "Massillon" means the stainless sheet cold rolling and finishing facilities owned by Republic (as of March 21, 1984) located in Massillon, Ohio.

III

[Applicability]

A. The provisions of this Final Judgment shall apply to the defendants, their successors and assigns and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets involved in the production of carbon and alloy hot and cold rolled sheet steel and stainless hot and cold rolled sheet steel, that the acquiring party agrees to be bound by the provisions of this Final Judgment.

IV

[Divestiture]

A. Within six (6) months of the date of entry of this Final Judgment, but in no event later than December 1, 1984, defendants are hereby ordered and directed to divest to a purchaser or purchasers all of their direct and indirect ownership in and control over Gadsden and Massillon.

B. Divestiture of Gadsden shall be accomplished in such a way as to ensure that, as of the time of divestiture, it can reasonably be anticipated that Gadsden can and will be operated by the purchaser or purchasers as a viable, ongoing business engaged in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel made from slabs produced at Gadsden or

elsewhere. Divestiture shall be made to a purchaser or purchasers who shall demonstrate to the plaintiff or, if plaintiff objects, to the Court that (i) the purchase is for the purpose of competing effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel, and (ii) the purchaser or purchasers have the managerial, operational and financial capability to compete effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel.

C. Divestiture of Massillon shall be accomplished in such a way as to ensure that, as of the time of divestiture, it can reasonably be anticipated that Massillon can and will be operated by the purchaser or purchasers as a viable, ongoing business engaged in the manufacture and sale of stainless cold rolled sheet steel. Divestiture shall be made to a purchaser or purchasers who shall demonstrate to the plaintiff or, if plaintiff objects, to the Court that (i) the purchase is for the purpose of competing effectively in the manufacture and sale of stainless cold rolled sheet steel, and (ii) the purchaser or purchasers have the managerial, operational and financial capability to compete effectively in the manufacture and sale of stainless cold rolled sheet steel.

D. In connection with the divestiture of Massillon, defendants shall offer to the purchaser of Massillon (herein and in the Appendix annexed hereto referred to as "Buyer") a long-term contract to supply Buyer with stainless steel hot bands on such terms and conditions as are reasonably designed to enable Buyer effectively to compete with defendants in the manufacture and sale of cold rolled stainless steel sheet and strip. Unless plaintiff agrees otherwise, the contract to be offered to Buyer by defendants shall include in substance the terms set out in the Appendix annexed hereto. Unless the context otherwise requires, all references in this Final Judgment to the divestiture of Massillon shall mean and include the long-term contract referred to herein, and the procedures of Sections VI and VII of this Final

Judgment, including but not limited to approval by the plaintiff, shall be equally applicable to the long-term contract.

E. In accomplishing the divestiture ordered by this Final Judgment, the defendants shall make known in the United States and in other major noncommunist steel producing countries, by usual and customary means, the availability of Gadsden and Massillon for sale as ongoing businesses. The defendants shall notify any person making an inquiry regarding the possible purchase of Gadsden or Massillon that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. The defendants shall also furnish to all bona fide prospective purchasers who so request all pertinent information regarding Gadsden and Massillon and shall permit them to make such inspection of physical facilities and any and all financial, operational, or other documents and information as may be relevant to the sale of either or both facilities.

F. Defendants agree to take all reasonable steps to accomplish said divestiture, including the sale of assets only. Except to the extent otherwise approved by the plaintiff, Gadsden and Massillon shall be divested free and clear of (i) all mortgages, encumbrances and liens, (ii) any contractual commitments or obligations (such as "take or pay" fuel and ore supply contracts) existing as of the date of divestiture, unless the purchaser or purchasers of the divested plant voluntarily assume the future performance of any such existing contracts, (iii) any pension rights of present or former employees accrued as of the date of divestiture, and (iv) any termination payment rights of former employees accrued as of the date of divestiture, all of which shall continue to be the obligation of defendants. In the event that as a matter of law the plants cannot be sold free and clear of any such mortgages, encumbrances, liens, commitments or obligations, defendants shall hold the purchaser or purchasers harmless with respect to the same. In order to enable the

purchaser of Gadsden to continue to operate the steel mill without undue interruption following divestiture, defendants agree that, at the request of the purchaser, they will continue, for a period not exceeding six months (unless extended by the Court) from and after the date of divestiture, to sell for use at Gadsden necessary raw materials, including iron ore, coal, limestone and coke, to the extent that such items are currently being supplied by defendants to Gadsden, and on substantially the same financial and other terms and conditions.

V

[Appointment of Trustee]

A. If the defendants have not divested all of their ownership interest in Gadsden and Massillon within the time period specified in Section IV(A) of this Final Judgment, the Court shall, on application of the plaintiff, appoint a trustee to effect the divestiture. Such appointment shall become effective not more than 45 days following the filing of the petition. The trustee shall dispose of Gadsden and Massillon at such price and on such terms as are then obtainable upon a reasonable effort by the trustee, subject to the provisions of Section VI of this Final Judgment, and shall have such other powers as this Court shall deem appropriate. The trustee shall have the power to require the defendants to divest assets only, retaining and assuming all liabilities of Gadsden and Massillon upon their divestiture. Defendants shall not object to a sale by the trustee on any grounds other than malfeasance, provided, however, that if the buyer chooses to purchase any inventory of semi-finished or finished steel mill products, coke or raw materials, defendants shall have a right to object unless the aggregate sale price shall include a price (payable on reasonable terms), in the case of steel or coke inventory, at least equal to the current production cost of that inventory and, in the case of raw materials, at least equal

to the cost thereof, as reflected in either case on the books and records of defendants.

B. As to Gadsden, the trustee shall have the power to require defendants to sell necessary raw materials for use at Gadsden in accordance with the provisions of Section IV(F). As to Massillon, the trustee shall have the power to cause defendants to execute a long-term supply contract in accordance with the provisions of Section IV(D) and the Appendix.

C. If defendants have not divested all of their ownership interest in both Gadsden and Massillon within five (5) months of the date of entry of this Final Judgment, but in no event later than November 1, 1984, the plaintiff and the defendants (acting jointly) shall immediately notify each other in writing of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. The parties shall attempt to agree upon one of the nominees to serve as the trustee. If the parties are able to agree on a trustee within thirty (30) days of the exchange of names, plaintiff shall notify this Court of the person upon whom the parties agreed and this Court shall appoint such person as the trustee. If the parties are unable to agree within that time period, plaintiff shall furnish this Court the names of each party's nominees. This Court may hear the parties as to the qualifications of the nominees and shall appoint one of the nominees as the trustee.

D. The trustee shall serve at the cost and expense of the defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from a sale of Gadsden and Massillon and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services, all remaining monies shall be paid to the defendants and the trust shall then be terminated. The compensation of such trustee shall be based on a fee arrangement providing the trustee with an incentive based on the price

and terms of the divestiture and the speed with which it is accomplished.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee shall have full and complete access to the personnel, books, records and facilities of the businesses to be divested, and defendants shall develop such financial or other information relevant to the assets to be divested as the trustee may request. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture as contemplated under this Final Judgment. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee shall thereupon promptly file with the Court a report setting forth (i) the trustee's efforts to accomplish the required divestiture, (ii) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which shall, if necessary, include extending the trust and the term of the trustee's appointment.

VI

[Notice]

At least thirty (30) days prior to the scheduled closing date of any proposed divestiture pursuant to Section IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the plaintiff of the proposed divestiture. If a trustee is

responsible, it shall similarly notify the defendants. The notice shall set forth the details of the proposed transaction and list the name, address and telephone number of each person not previously identified who offered or expressed an interest or desire to acquire any ownership in Gadsden or Massillon together with full details of same. Within fifteen (15) days of receipt by plaintiff of such notice, the plaintiff may request additional information concerning the proposed divestiture and the proposed purchaser. The defendants shall furnish the additional information within twenty (20) days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) days after receipt of the notice or within fifteen (15) days after receipt of the additional information, whichever is later, the plaintiff shall notify in writing the defendants and the trustee, if there is one, if it objects to the proposed divestiture. If the plaintiff fails to object within the periods specified, or if the plaintiff notifies in writing the defendants and the trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under the proviso in Section V(A). Upon objection by the plaintiff or by the defendants under the proviso in Section V(A), the proposed divestiture shall not be accomplished unless approved by the Court. The defendants shall have no right to object to any divestiture of Gadsden or Massillon proposed by the trustee except under the proviso to Section V(A).

II

[Compliance Affidavit]

Thirty (30) days from the date of entry of this Final Judgment and every thirty (30) days thereafter until the divestiture has been completed, the defendants shall deliver to plaintiff an affidavit as to the fact and manner of compliance with Section IV of this Final Judgment. Each such affidavit shall include the name, address and telephone number of each person who, during

the preceding thirty (30) days, made an offer, expressed an interest or desire to acquire, or entered into negotiations to acquire, or made an inquiry about acquiring any ownership interest, in either Gadsden or Massillon, and shall describe in detail each contact with any such person during that period. The defendants shall maintain full records of all efforts made to divest Gadsden and Massillon.

VIII

[Preservation of Assets]

Until the divestiture required by this Final Judgment has been accomplished, the defendants shall:

A. maintain normal repair and maintenance schedules at Gadsden and Massillon and preserve those facilities as they currently exist, except for the deterioration of the blast furnace and coke ovens normally associated with continuing usage;

B. refrain from altering or selling any assets of Gadsden or Massillon, other than in the ordinary course of business, or from taking any action that will have the effect of reducing the scope of Gadsden's or Massillon's manufacturing or sales operations or its product line from that existing at the time of the filing of the Complaint in this action, within the prior approval of the plaintiff;

C. refrain from taking any action that would jeopardize the sale of Gadsden as a viable competitor in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel and of Massillon as a viable competitor in the manufacture and sale of stainless cold rolled sheet steel; and

D. until divestiture of Massillon is accomplished, establish a marketing organization for the sale of cold rolled stainless sheet steel from Massillon which shall be maintained separate and apart from J&L Stainless' marketing organization in the same manner and to the same extent as if J&L Stainless and

Republic remained competitors, and there shall be no understanding, agreement, consultation or other communication between the two organizations or its members with regard to prices or terms of sale to customers of stainless sheet steel or as to the allocation or division of trade or customers. LTV and Republic shall forthwith advise in writing all managerial employees of J&L Stainless or Republic having any responsibilities with regard to the marketing of stainless sheet steel of the provisions of this paragraph.

IX

[Court Review]

For the sole purpose of enforcing the limited right to Court review of contract disputes provided in paragraph 12 of the Appendix to this Final Judgment, the purchaser of Massillon, and its successors and assigns, may make application to the Court for such relief as may be appropriate to carry out the intent of Section IV(D) of this Final Judgment.

X

[Compliance Inspection]

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted:

1. access during office hours of such defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession

or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to any defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

No information or documents obtained by the means provided in this Section X shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United State[s] is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by any defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and such defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure", then ten days' notice shall be given by plaintiff to defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI

[Industry Data]

Defendants are hereby enjoined and restrained for a period of ten (10) years from providing to the American Iron and Steel Institute for transmittal to any other steel company, or receiving from the American Iron and Steel Institute, without the consent of plaintiff, operating, output and/or efficiency data for individual operating units including, but not limited to, coke ovens, sinter plants, blast furnaces, electric furnaces, basic oxygen furnaces, primary mills, continuous casters, bar mills, plate mills, structural mills, hot strip mills and sheet finishing mills.

XII

[Future Acquisition]

Defendants are hereby enjoined and restrained for a period of ten (10) years from acquiring one percent (1%) or more of the voting securities of any person engaged in the manufacture or sale of carbon and alloy hot and cold rolled sheet steel or stainless hot and cold rolled sheet steel, the assets of which are recorded on the books of such company (net of related valuation reserves recorded on such books) in an amount in excess of $15 million, or from acquiring from any such person, except pursuant to supply arrangements or otherwise in the ordinary course of business, assets relating to such products (except raw materials) in an amount in excess of $15 million without first obtaining the consent of plaintiff or, if plaintiff objects, the approval of this Court upon defendants' establishing, by a preponderance of the evidence, that the acquisition will not lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

XIII

[Retention of Jurisdiction]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XIV

[Ten-Year Term]

This Final Judgment will expire on the tenth anniversary of the date of its entry, except that as to the supply contract referred to in Section IV(D), on the termination thereof.

XV

[Public Interest]

Entry of this Final Judgment is in the public interest.

Appendix

Terms of the Long-Term Supply Contract

(1) The term of the contract shall be not less than ten years, with a right of renewal in Buyer for not less than two additional years in the event Buyer cannot by a reasonable effort secure an adequate alternative source of stainless steel hot bands upon expiration of the original term of the contract and that defendants then have substantially as much stainless steel hot band capacity as they have today.

(2) Stainless steel hot bands supplied to Buyer shall be as specified by the Buyer and at least equal in quality to hot bands

used by defendants to manufacture cold rolled stainless steel sheet and strip for sale by defendants to their own customers.

(3) Defendants agree to supply up to 100 percent of the Massillon requirements of stainless steel hot bands for further finishing into cold rolled sheet and strip at Massillon and sale of such sheet and strip by Buyer, up to a maximum of 30,000 tons per quarter, and not to exceed 10,000 tons in any given month, with a right in Buyer to increase the maximum to 36,000 tons per quarter (and not to exceed 12,000 tons in any given month) in the event that the capacity of Massillon is increased to accommodate such larger supply.

(4) Lead times for Buyer's placing orders with defendants, submitting change orders, and cancelling orders shall be on terms and conditions not less favorable to Buyer on a proportionate basis than the practice normally followed by defendants in connection with orders submitted by defendants' own marketing organization. All orders placed by Buyer shall be filled in accordance with its specifications, unless modified with Buyer's consent.

(5) Stainless steel hot bands furnished to Buyer shall be melted at J&L's Midland plant and rolled at J&L's Cleveland plant, except that ingots for 60" wide hot bands and other specialty products for Massillon now produced at Republic's Canton plant and which Midland is not now capable of producing shall continue to be furnished from Canton. In the event that any of these plants should for any reason become inoperative or unavailable, defendants shall supply Buyer from such other plant or plants as it may then operate, on like terms as herein provided for with respect to the Canton, Midland and J&L Cleveland plants.

(6) In case of shortage, interruption of supply or other force majeure events, Buyer shall be accorded relatively equal status in all respects with defendants' own manufacturing and marketing

organizations and customers, and defendants shall not give preferential treatment to their own organizations and customers.

(7) Buyer shall be permitted at its option to place orders for stainless steel hot bands with other suppliers either in addition to or in lieu of placing orders with defendants.

(8) The purchase price for the stainless steel hot bands shall be based upon (i) defendants' actual average monthly manufacturing costs by grade, plus (ii) overhead expenses accumulated on a monthly basis and allocated based on the ratio of defendants' hot band shipments to Buyer to defendants' total hot band production, together with (iii) a markup equal to ten percent of manufacturing and overhead expenses.

(9) Payment shall be made by Buyer for stainless steel hot bands purchased from defendants at the end of each month following the month of delivery.

(10) Defendants will submit to Buyer monthly proof of all cost data used to calculate price, subject to right of audit by Buyer. Defendant shall grant Buyer reasonable access for inspection to its manufacturing facilities used to supply product to Buyer, and to all financial and other records pertinent to the contract or the parties' obligations thereunder.

(11) Subject to plaintiff's prior approval, Buyer shall have the right to assign the contract to any successor of Buyer's interest in Massillon.

(12) An appropriate method shall be provided for the speedy resolution of disputes under the contract. In the event of a dispute, and following reasonable efforts to resolve the dispute through the mechanism provided in the contract (unless the Court agrees to a waiver of this requirement by reason of emergency). Buyer shall have the right to petition this Court, in accordance with Section IX of this Final Judgment, for such relief under the contract as may be appropriate, based on a clear and convincing showing by Buyer that without such relief Buyer

will be unable effectively to compete with defendants in the sale of cold rolled stainless steel sheet or strip in accordance with the intent of Section IV(D) of this Final Judgment.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE LTV CORPORATION; JONES & LAUGHLIN STEEL INCORPORATED; J&L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION,
Defendants.

Civil Action No. 84-0884
(Judge Pratt)

Filed: December 10, 1984
James F. Davey, Clerk

ORDER

Having considered the petition of the United States for the appointment of a trustee and that the parties have agreed upon a nominee to serve as trustee in this matter, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. Pursuant to Section V of the Final Judgment entered on August 2, 1984, Oppenheimer & Co., Inc. is appointed trustee to effect the divestiture of defendants' direct and indirect ownership in and control over the flat-rolled carbon steel mill located in Gadsden, Alabama (hereinafter "Gadsden").

2. The trustee shall dispose of Gadsden at such price and on such terms as are then obtainable upon a reasonable effort by

the trustee, subject to the provisions of Section VI of the Final Judgment, and shall have such other powers as this Court shall deem appropriate. The trustee shall have the power to require the defendants to divest assets only, retaining and assuming all liabilities of Gadsden upon its divestiture. Defendants shall not object to a sale by the trustee on any grounds other than malfeasance, provided, however, that if the buyer chooses to purchase any inventory of semi-finished or finished steel mill products, coke or raw materials, defendants shall have a right to object unless the aggregate sale price shall include a price (payable on reasonable terms), in the case of steel or coke inventory, at least equal to the current production cost of that inventory and, in the case of raw materials, at least equal to the cost thereof, as reflected in either case on the books and records of defendants.

3. The trustee shall have the power to require defendants to sell necessary raw materials for use at Gadsden in accordance with the provisions of Section IV(F) of the Final Judgment.

4. The trustee shall serve at the cost and expense of the defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from a sale of Gadsden and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services, all remaining monies shall be paid to the defendants and the trust shall then be terminated. The compensation of such trustee shall be based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

5. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee shall have full and complete access to the personnel, books, records and facilities of the businesses to be divested, and defendants shall develop such financial or other information relevant to the assets to be divested as the trustee may request. Defendants shall take

no action to interfere with or impede the trustee's accomplishment of the divestiture.

6. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture as contemplated under this Final Judgment. If the trustee has not accomplished such divestiture with six (6) months after its appointment, the trustee shall thereupon promptly file with the Court a report setting forth (i) the trustee's efforts to accomplish the required divestiture, (ii) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which shall, if necessary, include extending the trust and the term of the trustee's appointment.

7. The divestiture of Gadsden by the trustee shall be in accordance with the provisions of the Final Judgment.

Dated: December 10, 1984

/s/

J. H. Pratt
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff

v.

THE LTV CORPORATION; JONES & LAUGHLIN STEEL INCORPORATED; J & L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION,
Defendants.

Civil Action: No. 84-0884
(Judge Pratt)

Filed: December 17, 1985
James F. Dewey, Clerk

ORDER

Upon consideration of the objections filed by The LTV Corporation ("LTV") and the United Steel Workers of America ("Union") and GSSC Corporation ("GSSC") to the proposed divestiture of Gadsden to The Brenlin Group ("Brenlin"), the responses thereto filed by the Department of Justice ("Department"), Brenlin, and Oppenheimer & Co., Inc. ("Trustee"), and testimony and argument presented to the Court on December 13, 1985, it is by the Court this 17th day of December, 1985, ORDERED:

1. The objections of LTV are denied.

2. The objections of the Union and GSSC are denied.

3. The proposed divestiture to Brenlin is approved pursuant to terms contained in the Agreement of Purchase and Sale of Assets and the Agreement of Purchase and Sale of Real Property submitted to the Trustee on September 23, 1985, with the following modifications:

(a) Section 2.5 of the Agreement of Purchase and Sale of Assets concerning accounts receivable is deleted;

(b) Section 6.1(c) of the Agreement of Purchase and Sale of Assets concerning the mini-reline is amended to provide as follows:

> "(c) LTV will continue the engineering work required for the 'mini-reline' of the blast furnace with reasonable diligence, and will continue to do so until the Closing. Newco will reimburse LTV for the costs expended for this work at closing, subject to audit."

(c) Section 6.1(d) of the Agreement of Purchase and Sale of Assets concerning installation of the sixth stand in the hot strip mill is deleted;

(d) Section 11.5(b) of the Agreement of Purchase and Sale of Assets concerning the covenant not to compete is deleted;

(e) the commitments made by Brenlin to the Department of Justice on November 27, 1985, concerning capitalization and management fees, are added; and

(f) such other modifications as may be agreed to by LTV and Brenlin and approved by the Trustee and, if material to the viability of Gadsden, by the Department of Justice.

4. LTV shall prepare, execute, and/or sign all documents necessary for divestiture, at such time and place and in such manner as shall be directed by the Trustee, but no later than December 31, 1985. The Closing Date shall be December 31,

1985, or such date reasonably extended by the Trustee, but no later than January 31, 1986.

5. LTV shall take no action that will cause an adverse change in the condition or business of Gadsden prior to divestiture.

6. LTV shall allow Brenlin immediate access to Gadsden, including physical facilities, employees, books and records, customers and suppliers, and such other information as may be necessary to effectuate orderly divestiture and maintain continuity of business operations.

7. Pursuant to Sections 3.2 and 12.1 of the Agreement of Purchase and Sale of Assets, LTV shall terminate all Gadsden employees on the last business day prior to the Closing Date.

8. The Trustee shall submit its statement for fees and expenses, including expenses incurred in connection with the foregoing objections and any appeal of this Order, to LTV within fourteen (14) days after the Closing Date, and LTV shall pay the fees and expenses of the Trustee within thirty (30) days after submission of the statement.

9. The motion of LTV, joined by the Union and GSSC, for a stay pending appeal is denied.

/s/

John H. Pratt
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

v.

THE LTV CORPORATION; JONES & LAUGHLIN STEEL, INCORPORATED; J & L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION,

Defendant.

Civil Action No. 84-0884
(Judge Pratt)

Filed: January 30, 1986
James F. Davey, Clerk

ORDER

The Brenlin Corporation ("Brenlin"), having filed a Motion for a Temporary Restraining Order, Motion for a Preliminary Injunction, and a Motion to Show Cause, and by agreement between Brenlin, defendants ("LTV"), the Department of Justice, and the Trustee, it is by the Court this 30th day of January 1986, ORDERED:

1. Brenlin's Motions now pending before this Court are hereby dismissed, without prejudice.

2. The Temporary Restraining Order entered by this Court on January 23, 1986, is hereby terminated.

3. LTV will forthwith cause the dismissal of its appeal now pending before the United States Court of Appeals for the District of Columbia in Docket No. 85-6222.

4. LTV is enjoined from removing (and if so removed, to return) or altering any business records from or concerning the Gadsden plant including accounts receivable records, purchase orders, bills of lading, price lists, correspondence, memoranda, and all other documents and papers that refer or relate thereto, for the period of January 1, 1985 through January 31, 1986, and for all LTV forecasts, estimates or plans for the Gadsden plant for 1986. Nothing contained in this Order shall limit LTV's ability to remove copies of such materials from Gadsden. LTV may also remove unused checks, facsimile signature plates, and original cancelled checks, subject to Newco's right to copy cancelled checks if requested.

5. The closing shall take place on January 31, 1986, and at closing:

(a) all parties agree that the purchase price shall be $37 million, subject to adjustment as provided in Section 2.1(a) of the Agreement of Purchase and Sale of Assets, as modified by this Court's Order of December 17, 1985, and the payment shall be by note only in the amount of $37 million;

(b) all parties approve of the form and content of the note (Exhibit A attached hereto), and LTV will no longer object to the opinion of Bear Stearns (Exhibit B attached hereto); and

(c) LTV agrees that the inventory of slabs, semi-finished, and finished steel shall be no less than $29 million at closing, based on current production costs as reflected on the books and records of Gulf States Steel Corporation; provided, however, that if such inventory is less than $29 million, LTV shall make up the difference with accounts receivable (unconditionally guaranteed to be paid within 30 days), cash, or a combination of such accounts receivable and cash, at LTV's

election, and such amount shall be added to the note. If any account receivable is not paid within 30 days, LTV shall pay cash upon Newco's tender of any such unpaid account receivable.

6. LTV shall provide Newco, from LTV's existing mills, with 25,000 tons of slabs (or less if Newco so determines) of the exact quality, size, and specifications necessary to meet customer requirements, at a price equal to the average production costs of such slabs produced at the Gadsden plant during December 1985 and January 1986, subject to LTV's capability to produce slabs that can meet the requisite quality, size, and specifications. Shipments shall not exceed 5,000 tons of slabs per week, to a place determined by Newco. At the request of Newco, LTV will produce an additional 5,000 tons of slabs if it has uncommitted capacity to do so. Orders may be placed no sooner than February 1, 1986, and no later than March 21, 1986. LTV shall ship all slabs within two weeks from receipt of the order. All shipping costs to Gadsden shall be borne by LTV. If slabs can be produced to a slightly different length or thickness and still satisfy Newco's requirements while at the same time reducing costs for LTV, the parties agree to discuss in good faith changing the specifications accordingly. However, Newco's decision shall be controlling and final.

7. In the event that LTV fails to perform as specified in this Order, Brenlin shall have the right to move this Court for orders granting appropriate relief in law and equity.

8. This Order is entered without prejudice to the rights of the parties in other pending proceedings arising from the divestiture of the Gadsden plant to Brenlin.

9. Nothing contained in this Order is intended to or shall affect any fees due to the Trustee or the calculation thereof pursuant to orders entered previously in this proceeding.

10. This Court retains jurisdiction for the purpose of enabling any of the parties to appear before this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, this Court's Order of December 17, 1985, or the orders of this Court entered pursuant thereto, for the modification of any provisions thereto, for the enforcement of compliance herewith and/or for any violations thereof.

/s/

John H. Pratt
United States District Court Judge

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1991
CA 91-1072

No. 92-7001

The LTV Corporation, et al.,

Appellants

v.

Gulf States Steel, Inc. of Alabama

Filed July 29, 1992
Constance L. Dupré, Clerk

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
Constance L. Dupre, Clerk

BY:/s/
Robert A. Bonner, Deputy Clerk

APPENDIX N

STATUTES

15 U.S.C. § 16(b)-(h)

Section 5 of the Clayton Act, 15 U.S.C. § 16(b)-(h) (1988), known as the Antitrust Procedures and Penalties Act or Tunney Act, provides:

> (b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—
>
> (1) the nature and purpose of the proceeding;
>
> (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct —

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider —

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individually alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) In making its determination under subsection (e), the court may —

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) No later than 10 days following the date for the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all

written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been compiled with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

15 U.S.C. § 18

Section 7 of the Clayton Act, 15 U.S.C., § 18 (1988), provides in pertinent part:

> That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person . . . shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any

> line of commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

28 U.S.C. § 2072(b)

The Rules Enabling Act, 28 U.S.C. § 2072(b) (1988), provides in pertinent part:

> The Federal Rules of Civil Procedure] shall not abridge, enlarge or modify any substantive right.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b)

Federal Rule of Civil Procedure 60(b), provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, . . . or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 67

Federal Rule of Civil Procedure 67 provides:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part

of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, § 725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

APPENDIX O

Federal Register
Vol 49, No. 140
July 19, 1984

It is advanced by the Department of Justice that the required divestiture has a major mitigating effect on the concentration in carbon and alloy sheet which was alleged to be in violation of the Clayton Act by virtue of reducing the *increase* in the HHI by approximately 1/3 (Press Release of March 21, 1984, page 2). However, it is clear that even when Gadsden divestiture is viewed in its most favorable light the decree of concentration in this case exceeds the Department's guidelines (Jensen Memorandum, page 5). When the tenuous character of this divestiture is recognized its value as a curative measure shrinks to deminimus.

If the plant is eventually closed the divestiture required by the decree becomes a sham. This conclusion was stated expressly by Mr. McGrath in his press conference of March 21 in the following exchange with a questioner:

"Question: Why would the shutdown of the two plants be unacceptable?

"Mr. McGrath: The shutdown of the two plants would be unacceptable because if the plants are simply shut down it does not do anything to help repair the increase in concentration that has occurred.

"Instead, if the plants are operated by a separate entity, there will be a new player in the market. In the case of stainless, there are only a few companies that make stainless steel and we want to make sure that this merger does not reduce the number of companies by one. In the case of carbon and alloy sheet, again there are relatively few companies in this country that are surviving in that business. We want to make sure that the Gadsden facility is run by a company that will be a player in the

market, that will therefore increase competition in the market and we want to make sure that the — that it doesn't simply get shut down." (Transcript of Press Conference of March 21, page 23, attachment to Plaintiff's Memorandum of April 20, 1984)

So, the public record shows that effective operation of the Gadsden plant is essential in the eyes of the Department of Justice to cure one of the violations which prompted this action. By Mr. McGrath's own statement quoted above, continued competitive operation of this plant is essential to any remedy of the violation alleged in the Complaint. If the face of these considerations the Department has chosen to depart from its standard "fix-it-first" practice and let the merger go forward with *no* assurance that this divestiture will take place or that, if it does, that the plant will be operated by an effective competitor.

This very substantial doubt is heightened by the following facts about the Gadsden plant:

(1) In 1982, Republic *cancelled* previous plans to modernize the Gadsden facility by installation of new equipment at the 54-inch hot strip mill to permit processing of thicker slabs (Source: Republic 1982 10-K, p. 7);

(2) In 1982 at the Gadsden facility, Republic idled its Thomas coke ovens and No. 1 blast furnace and temporarily suspended operations at its No. 2 blast furnace, sinter plant, basic oxygen furnaces and 40-inch blooming mill. Operations at these facilities, except for the Thomas coke plant, sinter plant and No. 1 blast furnace, recommended in 1983 (Source: 1983 10-K, p. 7);

(3) In December 1982, Republic entered into a consent order with the state of Alabama pertaining to the operation of the No. 2 Coke battery at the Gadsden plant. That order required Republic to implement an air pollution control program and requires Republic to pay a penalty of over $250,000 if the control program is not implemented. Further, a daily penalty

for future violations of pollution standards is imposed and "is applicable *until the battery is permanently shut down.*" (Source: Republic 1982 10-K, p. 10);

(4) The Gadsden plant coke oven was named, in 1982, as a "cancer hot-spot" producing potentially dangerous pollution, according to the National Clean Air Coalition (Source: UPI March 10, 1982);

(5) Earlier this year, Republic rejected a proposal made by leaders of the United Steel Workers Union and officials of the Alabama Development Office designed to pump about $19 million in new equipment at the Republic Steel Gadsden plant. According to published reports, the Alabama Development Office made the $19 million modernization proposal "in hope of heading off the possible shut down" of the Gadsden steel plant. (Source: UPI February 2, 1984). Republic's rejection of the $19 million modernization plan suggests that it knew that its merger with LTV would allow it to shut down Gadsden;

(6) Reports have abounded that the Gadsden facility would have been shut down regardless of the outcome of this merger (*e.g.*, UPI February 2, 1984, "The merger is expected to result in some plant closings and the Gadsden operation is rumored to be among those that will be shut down.") When asked in the fall of 1983, to comment on such reports, a spokesman for LTV was quoted as saying: "We're a long, long way from coming to grips with the Gadsden plant * * * That's not to say it's positive or negative." (Source: UPI September 29, 1983). Thus, as of the fall of 1983, LTV officials could not state that the Gadsden operation would continue to exist.

Divestiture of Gadsden is questionable. Successful operation of this plant as an effective competitor to the merger entity is even more questionable. This is apparent from an appraisal of the facility and its products.

Wheeling-Pittsburgh does not have access to other than published data to make such an assessment, but even from such sources it is apparent that this is a very marginal facility. Attached for the Court's reference as Exhibit IV is an excerpt from the Directory of Iron and Steel Works of the U.S. and Canada, 1980 Edition. It shows the characteristics of Gadsden and other Republic facilities.

APPENDIX P

U.S. Department of Justice
Washington, D.C. 20530

JWC:JRK
60-138-037-26

November 6, 1985

Susan G. Braden, Esquire
Porter, Wright, Morris & Arthur
1133 15th Street, N.W.
Washington, D.C. 20005

Re: United States v. The LTV Corporation, et al.,
Civil No. 84-0884 (D.D.C.)

Dear Ms. Braden:

Pursuant to your request, I have summarized LTV's objections to the proposal of the Brenlin Group to purchase Gadsden. The classification of objections as "major" and "other" represents my opinion of the importance of the issue to LTV.

Major Objections

1. Purchase Price (Section 2.2): The purchase price of approximately $57 million is payable partly in cash ($14 million) and partly by a note ($43 million). The purchase price reflects the value of the inventory purchased from LTV. LTV objects to the note because it is unsecured. LTV also argues that because a union-busting sale creates a risk that the plant will never open, LTV is entitled to cash-up-front. If the note is "worth" $43 million, LTV argues that Brenlin should sell it and give LTV cash.

2. Inventory Build-up (Section 6.1(b)(i): The proposal requires LTV to transfer, at closing, slab inventories of 115,000 tons and finished goods inventories of 80,000 tons. Gadsden has 80,000 tons of finished goods, but only 73,000 tons of slabs. To produce the required slab inventories will cost LTV approximately $10 million.[1] LTV believes that the cost of the inventory build up should be guaranteed by a letter of credit and that Brenlin should have the risk of any failure to close the deal.

3. The Cost of a Plant Closure to LTV: LTV argues that a sale that requires a plant closure will have a substantial impact on LTV's financial health. It maintains that Brenlin's offer will cost LTV $90 million in cash over two years more than the union's proposal. LTV states that it will have to seek relief from the Court on the basis that it did not anticipate a loss of such magnitude.

4. Covenant Not To Hire (Section 11.5(b)): The proposal states that LTV cannot transfer or rehire any key employee of Gadsden (defined as employees earning over $15,000/year) from now until 90 days after closing. Further, LTV cannot hire for two years any person employed by Brenlin post-closing or who is offered post-closing employment by Brenlin. LTV sees the provision as punative to Gadsden's employees. The provision's unfairness will make it more difficult to retain employees in other businesses being sold by LTV (much of the company is being sold). LTV will not object to a narrower provision that will prevent it from crippling of Gadsden by transfering key employees prior to closing.

Other Objections

1. Purchase Price Allocation (Section 2.2(c)): The Brenlin proposal allocates $10 million of the purchase price to

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[1] $10 million represents the full cost of 42,000 tons of slabs (at $235/ton).

inventory and $47 to fixed assets. LTV terms the allocation a "sham" for tax purposes.

2. Accounts Receivable (Section 2.5): LTV maintains that it is not required to sell receivables under the Final Judgment and is unwilling to sell them on the terms Brenlin desires. At a minimum, LTV wants to be secured by a letter of credit. It also believes interest should be paid. LTV also argues that the sale of receivables will injure it because Brenlin has a disincentive to press delinquent accounts.

3. Product Returns (Section 13.2): LTV does not want Brenlin to be its agent to settle claims because it is afraid that Brenlin will be too liberal in settling claims. LTV proposes to do the job itself.

4. Mini-reline (Section 6.1(c)): Brenlin proposes to pay for LTV's expenses of preparing for the mini-reline of Gadsden's blast furnace thirty days after closing. The letter agreement between LTV and the Division states, however, that the purchaser will pay all cash costs from the date of our approval to the closing as they come due.

5. Sixth Stand in Hot Strip Mill (Section 6.1(d)): LTV is unwilling to commence preparatory work required for the installation of a sixth stand in the hot strip mill and asks if Brenlin really wants the people they intend to fire to work on the engineering.

6. Purchase of Support Services from LTV (Section 11.1 (a)): Brenlin's proposal requires LTV to provide data processing, accounting and other services (at cost plus 15 percent) for up to 12 months. LTV prefers a faster turnover of support services to Brenlin.

7. LTV Trademarks and Names (Section 11.3)): Due to concerns over product liability, LTV objects to the Brenlin proposal to identify itself for one year as "formerly the Gulf States Steel Division of LTV."

8. Covenant Not To Compete (Section 11.5(a)): The Brenlin proposal prevents LTV from selling Gadsden "products" to Gadsden "customers" for three years. LTV objects to a covenant not to compete.

9. Access to Plant (Section 12.3) Brenlin proposes a Court order giving it access to the plant prior to closing because it mistrusts LTV and desires to protect its interest in the plant. LTV objects because of the risk of a work stoppage. LTV argues that access to books and records off-site is sufficient to protect Brenlin.

10. LTV Representations (Section 3.2): This section contain a reference to LTV guarantees of its pension plan. LTV argues that a corporation does not guarantee pension plans and the contract should not erroneously imply such an obligation.

11. EPA/OSHA Liability (Section 4.1.13 and 4.1.14) These sections require LTV to identify EPA and OSHA liabilities. LTV wants the language modified to make it clear that LTV has no obligation to pay post-closure fines or corrections. LTV's liability should be limited to pre-closing fines.

12. Causes of Action (Section 1.1.5): LTV sees no obligation or reason for it to give up any causes of action that it may have.

13. Representation About Assets (Section 4.1.12): This provision states that the assets transferred to Brenlin "are sufficient in all material respects for the continuation of the . . . Business." LTV prefers to make no warrenties. It is afraid that this language implicitly imposes upon it a burden to inspect and also allows inexperienced new operators to blame LTV for any mistakes that they may make that could result in equipment damage.

14. Document Escrow (Section 8.2): A November 10 date to escrow documents is not feasible.

15. Notice (Section 13.3): Notice to LTV should go to LTV, not to Oppenheimer.

16. Closing (Section 8.1): LTV objects to closing upon 10 days notice after December 1. LTV desires a date certain.

17. Representations of Corporate Qualification (Section 4.1.1(a)): LTV cannot represent that LTV (broadly defined) is qualified to do business in Alabama. It can represent that the relevant entities are so qualified.

I hope the foregoing will be helpful.

Sincerely yours,

/s/_____
J. Robert Kramer II
Attorney
Antitrust Division

APPENDIX Q

U.S. Department of Justice
Washington, D.C. 20530

November 27, 1985

Honorable John H. Pratt
United States District Court for
the District of Columbia
Room 4323
U.S. District Court House
3rd and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: United States v. The LTV Corporation,
Civ. No. 84-0884 (D. D.C.)

Dear Judge Pratt:

This letter is to inform the Court that the United States Department of Justice, pursuant to Section VI of the Final Judgment in the above captioned matter, does not object to the October 8, 1985 recommendation of the Court-appointed trustee, Oppenheimer & Co., Inc., that the Gadsden steel mill of LTV be sold to The Brenlin Group. While there can be no guarantee that the Brenlin proposal will result in a strong, long-term competitor at Gadsden, there is a reasonable likelihood that it will. Also, it is far more likely to do so than the alternative presently offered by LTV. We describe below the reasons for these conclusions.

I

After LTV and its investment banker were unable to find a buyer for Gadsden, LTV and the Department of Justice agreed, pursuant to Section V.C. of the Final Judgment, that Oppenheimer be appointed trustee to divest Gadsden. After conducting a thorough, worldwide search for suitable purchasers of Gadsden, Oppenheimer concluded that The Brenlin Group was the only potential purchaser that met the requirements of Section IV.B. of the Final Judgment, i.e., that it had the managerial, operational, and financial capability to operate Gadsden as an effective competitor. We have reviewed the trustee's recommendation and analysis, and have conducted our own investigation, which included interviews of principals and officers of The Brenlin Group and of its bankers, and a thorough analysis of its business plans.

Brenlin is the parent of 14 affiliated companies acquired over the last ten years, with sales of about $240 million. Its principal activities are the production of metal automotive stampings, axles and brakes, containers and oil field casings, and the distribution of truck and trailer parts. Brenlin has acquired 22 smaller industrial operations, and has demonstrated an ability to turn around and restructure money-losing businesses.

Gadsden is such a business. It is expected to lose $33 million this year, just as it has lost money over the last several years. It is also in need of extensive capital improvements, approximately $100 million over the next five years. Hence, any viable operating plan must convert the large losses of recent years into substantial profits in order to finance these improvements. The trustee advised us that it:

> has extensively reviewed The Brenlin Group's Business Plan and has concluded that it is based on conservative assumptions and represents an operating philosophy that can reasonably be anticipated to

> develop Gadsden into a viable competitor in the carbon and alloy hot and cold rolled sheet steel business.

The only way to assure Gadsden's long term viability is to make substantial cost reductions in both raw materials and labor. Brenlin plans to make such changes. First, Brenlin plans to purchase major raw materials such as iron ore pellets and coal on the open market where it can obtain the best prices. At present, Gadsden is supplied by LTV, which owns its own high cost iron ore and coal mines, and supplies these materials to Gadsden at prices well above current market prices. Purchasing raw materials on the open market should help Gadsden attain a more competitive cost structure.

Next, it is generally recognized that for Gadsden to become viable, it must also reduce its labor costs. To permit this, Brenlin relies on Section V of the consent decree, to which LTV agreed:

> The trustee shall have the power to require the defendants to divest assets only, retaining and assuming all liabilities of Gadsden ... upon their divestiture.

The Brenlin business plan requires LTV to close Gadsden immediately before consummation of the sale. Brenlin would then reopen the plant without the burden of these liabilities, which include current labor agreements. We understand that Brenlin plans to reduce the number of employees, and their wages, and in turn to offer a profit-sharing plan. This appears necessary in order to permit Gadsden to lower its costs sufficiently to earn enough profits, even in a depressed steel industry, to afford the extensive modernization program needed by Gadsden. We were originally concerned that Brenlin's plan did not contemplate giving priority to current workers when rehiring a new labor force. Brenlin has recently, however, advised us and the workers in the plant that it would give them first priority.

Brenlin has also proposed a modernization program that is sorely needed by Gadsden. First, it would continue LTV's

program to reline the blast furnace. Then it plans to add a sixth stand, coil box and downcoiler on the hot strip mill, improvements that have long been needed. It also plans to substitute an electric furnace for the current blast furnace-basic oxygen furnace method of making steel. These improvements, plus many minor ones, are projected to cost about $100 million over the next five years. In addition, in 1991, Brenlin projects installing a continuous caster, which is used in all modern steel mills to produce the highest quality, lowest cost steel.

Finally, Brenlin has obtained financing commitments sufficient to provide purchase money, financing and working capital for Gadsden. Also, we consider it significant that Brenlin recently has committed itself to make an equity investment of $2.5 million in the Gadsden plant. Thus, we conclude that Brenlin and its business plan appear to meet all of the requirements of the Final Judgment.

II

We also wish to advise the Court that two weeks after Oppenheimer proposed Brenlin as the purchaser of Gadsden, we received a purchase proposal from an Employee Stock Ownership Plan ("ESOP") that represents the plant's employees and management. Although the trustee had been responsible for divesting Gadsden for almost a year, LTV negotiated an agreement with the ESOP for the sale of Gadsden without the participation or counsel of the trustee. Nonetheless, and notwithstanding that the trustees' deadline for the receipt of offers had expired, we asked Oppenheimer to review the ESOP proposal and to give us its opinion of that proposal along with a comparison between it and the Brenlin proposal. The ESOP made its final business plan available to us and to Oppenheimer only last week.

Our analysis has found some major shortcomings in the ESOP's plan that would adversely affect the viability of

Gadsden under such a plan. First, the agreement between LTV and the ESOP requires the ESOP for five years to purchase 75% of its requirements of iron ore pellets, 100% of its requirements of low volatility coal, and 60% of its requirements of high volatility coal from LTV at prices that are substantially higher than market prices. We estimate that this provision would burden Gadsden with yearly raw material costs that are about $13 million higher than it ought to bear and than it would bear under Brenlin management.

Second, the ESOP has recognized the need to reduce the plant's labor costs by cutting hourly pay by $5 per hour and by reducing employment by 240 employees out of over 2100 employees. Although this would help substantially, it may not be enough, given Gadsden's chronic unprofitability and its need for funds to finance a $100 million modernization program. The Brenlin plan, however, makes additional labor cost reductions that would further reduce the plant's cost structure and improve its chances of survival. We estimate that the Brenlin plan would have total yearly costs at least $20 million lower than those of the ESOP. This cost differential may be the factor that permits Gadsden to survive a recession or a bad year for the steel industry, and to finance the needed modernization program.

Finally, the ESOP agreed to give LTV a $23 million note for the plant, beyond its payment for Gadsden's inventory, and also to give LTV a note on December 31, 1990 equal to 10% of the firm's then net worth. Although these notes would not require payment of principal or interest for five years, they would further burden the ESOP-owned plant. Neither Brenlin nor any other purchaser would have paid anything like this for a plant that was losing money and was so in need of expensive capital improvements.

After analyzing the ESOP's proposal, Oppenheimer advised us that the ESOP's cost structure was substantially higher than that of the Brenlin plan. Indeed, the trustee believes that

Brenlin's cost advantage may be even greater than the $20 million dollar estimate we derived. According to the trustee, while it is possible that the ESOP would do fairly well in good steel years, the ESOP's higher cost structure would make it quite vulnerable in bad years when prices and volume fall. We independently reached this same conclusion.

III

LTV and the ESOP have argued that Brenlin will be unable to come to terms with the workers, and that a divestiture to Brenlin will therefore fail. The labor issue generally has been a matter of primary concern to the Department and the Trustee in evaluating both the Brenlin and ESOP proposals. Between November 15th and November 23rd, the Gadsden work force voted in favor of the ESOP proposal. However, Brenlin contends that Gadsden's workers may not have been fully informed regarding Brenlin's recent decision to give first priority to current workers when hiring a new labor force, or regarding the comparability of the Brenlin and ESOP wage plans, when they voted. Ultimately, it is probably impossible to assess with certainty how readily or when Brenlin and the Gadsden workers would reach an accommodation of their respective interests if the ESOP proposal were no longer an option.

We weighed this uncertainty most carefully in assessing the viability of the Brenlin proposal and comparing it to the ESOP. Our decision not to object to the Brenlin proposal despite this uncertainty reflects two conclusions. First, the ESOP proposal as currently structured is simply not a viable option, largely because of the deficiencies discussed above. Second, competition between Brenlin and the ESOP for Gadsden and for the allegiance of its work force will have to be put in the past if the Brenlin Group acquires Gadsden. Everyone will lose if Brenlin and the workers of Gadsden fail to reach agreement. They know this, and they know the changes that are needed to rebuild Gadsden in order to make it a strong and secure company

and employer. We believe that they will find that their common goal is stronger than any differences between them.

LTV has urged the Department of Justice to object to the Brenlin proposal also because it would damage LTV financially. LTV contends that because the Brenlin plan requires the firing and rehiring of Gadsden's work force, it will trigger substantial liabilities in the form of additional pension funding costs, supplemental unemployment benefit payments, layoff group health insurance, and severance. There appears to be a real question about whether such liabilities actually would be triggered by Brenlin's plan, however. LTV tells us that they would be, but at the same time we have been told by the union that LTV has told it that they would not. Even if they are triggered, however, we believe that LTV has seriously overstated the effect of the Brenlin plan for its own purposes and that the Brenlin plan will not materially affect LTV financially. LTV has made unrealistic assumptions and used inappropriate methodologies. For example, in calculating its liability for layoff expenses, it assumed that no worker would be rehired when in fact most will be offered jobs at Gadsden; and although many of the health care insurance expenditures would not be made for 5, 10, 15 or more years, LTV has failed to discount these expenditures to present value. In fact, we believe that LTV will be no worse off selling the plant to Brenlin than operating it themselves.

IV

We are sympathetic to the ESOP's aim of employee ownership of Gadsden, particularly since employees must make many of the sacrifices that are needed in order to make Gadsden a viable steel mill. We are unable, however, to approve a divestiture that does not have reasonable prospects of success. The ESOP's agreement with LTV appears so tilted in favor of LTV that the ESOP's viability would be jeopardized.

We informed the ESOP and LTV of our concerns in the last week. To date, however, the ESOP and LTV have both replied that their agreement is final, and that they are not prepared to make the changes that we and the trustee believe would be necessary to make Gadsden a viable steel mill. Absent such changes, there is only one viable purchaser of Gadsden. Accordingly, we have at this time determined that the Department should not object to the trustee's recommendation that Gadsden be divested to The Brenlin Group.

Sincerely yours,

J. Robert Kramer, II
Attorney
Antitrust Division

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APPENDIX R

Gulf States Steel Corporation

September 18, 1985

Mr. Michael Sappington
Lake Engineering and Development, Inc.
600 Lake Forrest Drive, Suite 350
Atlanta, GA 30328

Dear Mike,

Enclosed is the information you requested in your letter of September 9, 1985. The Consent Order from the ADEM regarding the coke oven stacks is a "draft". We are continuing to negotiate terms with them, especially in the amount of the bond. There are no OSHA citations currently pending.

There are no other pending enforcement activities at this time. However, there is the attainment issue, which results in a rule change to be adopted September 18, 1985. At this time, we do not have a copy of the final requirements. Enclosed is the last draft we received. I have marked those items that I know have been changed.

The capital projects for environmental controls, which we have considered, are not fully engineered nor estimated in detail. They depend, to some extent, on the requirements of the agencies, such as the issue of the Central Treatment Exemption, which we discussed. The following is our best forecast at this time:

(1)	Water Treatment for Coke Plant	7-10 million
(2)	B.O.F. Precipitator Repairs	3 million
(3)	Hot Strip/Cold Strip Water Treatment	3 million
(4)	No. 3 Battery Rehabilitation	3 million
(5)	Additional Solid Waste Disposal Area	2 million

After you finish your work, I would like to have these documents returned to me. If you need further information, please do not hesitate to call.

Sincerely yours,

/s/_____
K.W. Means, Manager
Engineering/Environmental

KWM:bcb

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE LTV CORPORATION; JONES & LAUGHLIN STEEL INCORPORATED; J&L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION
Defendants

Civil Action No. 84-0884
(Judge Pratt)

FILED: Nov. 27, 1985
Clerk U.S. District Court
District of Columbia

OBJECTIONS OF THE LTV CORPORATION TO PROPOSAL OF BRENLIN CORPORATION TO PURCHASE THE GADSDEN PLANT

On October 8, 1985 Oppenheimer & Co., Inc., the trustee appointed by the Court to effectuate the divestiture of the Gadsden, Alabama plant of The LTV Corporation ("LTV") pursuant to the terms of the Final Judgment in this action, notified the parties of a proposed sale of the plant to Brenlin Corporation of Akron, Ohio, as set forth in a purchase offer denominated "Agreement of Purchase and Sale of Assets" ("the Brenlin proposal"), attached hereto as Attachment A.

On November 23, 1985 the membership of Locals 2176 and 4382 of the United Steelworkers of America voted by an overwhelming vote — in excess of 73% — to form an Employee Stock Ownership Plan ("ESOP") to purchase the Gadsden plant from LTV.

For the reasons set forth in greater detail in the accompanying affidavits of James J. Paulos, W. Lawrence Weeks, David H. Hoag, Michael J. Hiemstra and Basil C. Culyba, LTV objects to the Brenlin offer and urges the Court to reject it and approve of the ESOP proposal. LTV's specific objections to the Brenlin proposal are as follows:

1. Because its proposal does not provide for a guaranteed and continued source of the labor needed to operate the Gadsden facility, Brenlin cannot reasonably be anticipated to have the operational capability to compete effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel, so that a divestiture to Brenlin will not ensure that Gadsden will be operated by the purchaser as a viable, ongoing business, as required by Section IV(B) of the Final Judgment.

2. Even if the Brenlin proposal satisfied Section IV(B) of the Judgment, the ESOP proposal will also create a viable competitive entity, whereas the Brenlin proposal would cause LTV very severe financial hardship that it would not confront if divestiture were accomplished to the ESOP.

3. The aggregate sale price to be paid for Gadsden under the Brenlin proposal is not "payable on reasonable terms," as required by Section V(A) of the Final Judgment. (Paragraphs 2.1 and 2.2 of proposal)

4. LTV is not required by the Final Judgment to build up inventories of slabs and finished goods for the benefit of the purchaser of Gadsden, as provided in the Brenlin proposal. (Paragraph 6.1(b)(i) and (ii) of proposal)

5. LTV is not required by the Final Judgment to sell its accounts receivable to the purchaser as provided in the Brenlin proposal, such receivables having been expressly excluded from the definition of "Gadsden" in Section II(G) of the Judgment. (Paragraph 2.5 of proposal)

6. LTV is not required by the Final Judgment to sell its causes of action, as provided in the Brenlin proposal. (Paragraph 1.1.5 of proposal)

7. LTV is not required by the Final Judgment to permit the purchaser to use its name by identifying itself as "Gulf States Steel, Inc. formerly Gulf States Steel Division of LTV Corporation," as provided in the Brenlin proposal. (Paragraph 11.3 of proposal)

8. Section VIII(A) of the Final Judgment obliges LTV to "maintain normal repair and maintenance schedules at Gadsden . . . and preserve those facilities as they currently exist." But it expressly excepts from that obligation "the deterioration of the blast furnace and coke ovens normally associated with continuing usage." LTV, while under no obligation to do so, entered into a voluntary agreement with the Department of Justice dated July 19, 1985, as amended on October 11, 1985 and November 5, 1985, that it would continue to take all steps reasonably necessary to assure that a mini-reline of the blast furnace at Gadsden will proceed as planned unless LTV gives the Department of Justice seven days prior notice of its intention to discontinue such steps. Pursuant to the terms of that agreement, LTV is entitled to be reimbursed by the purchaser of Gadsden for all such mini-reline costs as soon as the purchaser is approved by the Department of Justice, whereas the Brenlin proposal would delay reimbursement until thirty days after the Closing. (Paragraph 6.1(c) of proposal)

9. LTV is not required by the Final Judgment to install, or commence installing, a sixth stand in the hot strip mill at

Gadsden in order to increase the mill's capacity, as provided in the Brenlin proposal. (Paragraph 6.1(d) of proposal)

10. The assets to be divested to the purchaser are to be furnished "as is and where is," and LTV is not required by the Final Judgment to represent that such assets are sufficient in all material respects for the continuation of the present operation of Gadsden in the ordinary course of business, as provided in the Brenlin proposal. (Paragraph 4.1.12 of proposal)

11. LTV is not required by the Final Judgment to enter into a covenant not to compete with the purchaser, as provided in the Brenlin proposal. (Paragraph 11.5(a) of proposal)

12. LTV is not required by the Final Judgment to enter into a covenant not to employ any Gadsden employees, as provided in the Brenlin proposal. (Paragraph 11.5(b) of proposal)

13. The Court should not order LTV to permit a representative of the purchaser to be on the premises at Gadsden until the Closing with full freedom to communicate with all employees, to have complete access to all the books and records, and to make customer and supplier contacts, all as provided in the Brenlin proposal. (Paragraph 12.3 of proposal)

14. LTV is not required by the Final Judgment to assume any liability to fund, after the Closing, the cost of any corrective action required to be taken with respect to the divested assets under any applicable environmental law or regulation, as provided in the Brenlin proposal. (Paragraph 4.1.13 of proposal)

15. LTV is not required by the Final Judgment to assume any liability to fund, after the Closing, the cost of any corrective action required to be taken with respect to the divested assets under any applicable occupational and other health and safety law or regulation, as provided in the Brenlin proposal. (Paragraph 4.1.14 of proposal)

16. LTV should not be required to terminate its Gadsden employees prior to the Closing, as provided in the Brenlin proposal. (Paragraph 3.2 of proposal)

Respectfully submitted,

G. Emmett Smith
2001 Ross Avenue
Dallas, Texas 75201

J. Peter Kelly
C.L. Medford
B.C. Culyba
LTV Steel Company, Inc.
Law Department 1500L
P.O. Box 6778
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KAYE, SCHOLER,
FIERMAN, HAYS
& HANDLER

By /s/
Stanley D. Robinson

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Attorneys for Defendants
The LTV Corporation
Jones & Laughlin Steel
Incorporated
J&L Specialty Steels, Inc.
Republic Steel Corporation

Dated: November 27, 1985

APPENDIX S

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE LTV CORPORATION: JONES & LAUGHLIN STEEL INCORPORATED: J & L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION

Defendants.

Civil Action No. 84-0884
(Judge Pratt)

AFFIDAVIT OF JAMES J. PAULOS

)
District of Columbia) ss. :
)

JAMES J. PAULOS, being duly sworn, deposes and says:

1. I am presently Executive Vice President and Chief Financial Officer of The LTV Corporation ("LTV"). I am responsible for all financial activities of LTV and its various subsidiaries, including those of LTV Steel Company, Inc. ("LTV Steel"), LTV Aerospace & Defense and LTV Energy Products Company. I am also a member of the LTV management committee.

2. This affidavit is submitted in opposition to the proposal that The Brenlin Group ("Brenlin") be permitted to buy the Gadsden plant under the Final Judgment in this matter and in

support of its sale to the plant's employees pursuant to an Employee Stock Ownership Plan ("ESOP").

I. PREMERGER EVALUATION vs. POSTMERGER RESULTS

3. LTV and LTV Steel financial personnel began an evaluation of a potential merger with Republic in mid-1982. Extensive evaluation work continued through the remainder of 1982 and through September of 1983. This study which was conducted by the senior members of my financial group at both J&L Steel and LTV, led me to conclude that the merger with Republic would create a more viable and profitable entity then either J&L Steel or Republic standing alone. Ultimately, I recommended to LTV's Chairman and Chief Executive Officer, Raymond A. Hay, that LTV proceed with the merger. Mr. Hay concurred in my recommendation, and approval by LTV's bankers and board of directors was obtained in September of 1983 based upon management's assessment of the benefits to LTV. The merger took place on June 29, 1984.

4. Attachment 1 to this affidavit contains certain key excerpts from the presentations made to LTV's bankers and to its board of directors in September of 1983 prior to their approval of the merger. This information summarizes the results of LTV's financial evaluation of the merger and sets forth the basis for the conclusion of LTV's management, its bankers and its board of directors that the merger would substantially improve the financial results for LTV, J&L Steel and Republic. The final management conclusion, which is set forth on page 1 of Attachment 1, was as follows:

> "In the opinion of LTV's management the proposed acquisition is clearly in the best interests of the LTV and Republic shareholders and the respective bank groups. The combined steel operations will be substantially more cost competitive than either of the individual companies. The projected efficiencies, along with the reduced capital and working capital requirements, will provide substantially improved cash

> flow. The combined steel operation will be a fully competitive domestic integrated producer. As such, its capabilities and opportunities will be greatly enhanced in comparison to the existing companies."

This conclusion was grounded on two key premises: First, that efficiencies and cost reductions would result from the merger. Second, that market conditions, including product prices and import levels, would not worsen. Both premises were amply supported by our merger evaluation.

5. The financial projections presented to LTV's bankers and to its board of directors included forecasts based upon three separate sets of assumptions. Presentations were made on the basis of a "base case", an "upside case" and a "downside case". Each case presented financial projections for the years 1984, 1985 and 1986. The key assumptions contained in the forecast base case were as follows:

a. Industry shipments of 77, 85 and 85 million tons, respectively, for each year;

b. Cost increases, would be covered by list price increases and no adjustment was made for either; and

c. Cost reductions from capital spending, manning and yield programs were included.

These assumptions were adjusted for the downside and upside cases as shown in the notes on pages 5 and 6 of Attachment 1.

Page 3 of Attachment 1, in the "Forecast" (base case) column, shows a cumulative net income for 1984-1986 of $841 million for LTV (-$7 million; $354 million and $494 million, respectively). That forecast was driven by the forecasted operating income for LTV Steel of $1.19 billion (see page 2 of Attachment 1) for these three years ($133 million; $474 million; and $584 million, respectively). Instead, cumulative net *losses* for LTV Steel since the merger (through September 30, 1985)

have totaled a staggering $563.6 million. For LTV, net losses for the same period have totaled $594.7 million.

	In Millions				
	9/30	12/31	3/31	6/30	9/30
LTV Steel, Inc.					
Net	(85.7)	(157.7)	(161.9)	(86.4)*	(71.9)
Cumulative		(243.4)	(405.3)	(491.7)*	(563.6)*
LTV					
Net	(79.8)	(246.7)	(156.4)	(92.3)*	(19.5)
Cumulative		(326.5)	(482.9)	(575.2)*	(594.7)*

* Excludes $(380.0) million of special charges related to the indefinite idling of the Aliquippa, Pa. Works.

Under the worst case that was reasonably predictable at the time of the merger, LTV would have had a net loss of $217 million in 1984 but would have had net income in 1985 of $196 million (see merger "Downside" column of page 4 of Attachment 1). In other words, under the worst case that could be foreseen, LTV would have been almost at the break-even point at the end of 1985. Instead, in 1984 LTV had a net loss of $378.2 million (as opposed to the predicted net loss of $217 million) and through September 30, 1985 LTV lost another $648.2 million (as opposed to the predicted net income of $196 million for all of 1985) for a total net loss in 1984 and 1985 of $1.026 billion (as opposed to the predicted net loss for this period of just $21 million).

These unforeseen losses were incurred in spite of the fact that LTV Steel more than achieved the expected cost and efficiency benefits of the merger (see Michael J. Hiemstra affidavit). However, these benefits were not adequate to offset the unforeseen interrelated effects of the continuing high levels of imports and significantly reduced price realizations resulting

from severe domestic competition (see affidavit of David H. Hoag).

II. LTV'S CURRENT FINANCIAL CONDITION SINCE THE MERGER

6. LTV's outstanding long-term debt has increased by $903 million (over 50 percent) since the merger. LTV's outstanding long-term debt as of September 30, 1985 was $2.645 billion. In the same period the long-term debt of LTV Steel has increased by $399 million (almost 67 percent) to a total of $1.063 billion). Just during the period December 31, 1984 to September 30, 1985, the cash and liquidity of LTV and LTV Steel have deteriorated considerably. LTV's working capital has declined from $576 million to $388 million. As of September 30, 1985, LTV Steel had a working capital *deficit* of $94.8 million. In other words, LTV Steel's current liabilities exceeded current assets by $94.8 million as of September 30, 1985.

Losses can be funded through bank borrowings, public debt offerings or asset sales. None of these sources are realistically available to LTV Steel.

The total bank line of credit available to LTV for each quarter since the merger is as follows:

LTV Steel has no available bank credit lines of its own. It is prohibited from increasing its long-term debt until certain

	6/30/84	9/30/84	12/31/84	3/31/85	6/30/85	9/30/85
Total Bank Line:	690	690	690	640	540	640
Amount Borrowed:	219.7	252.7	287.7	295.2	409.7	438.7
Amount Available:	470.3	437.7	402.3	344.8	130.3	201.3

financial condition ratios are met. LTV Steel currently has a bank credit agreement which secures various existing obligations, the majority of which are contingent, in the aggregate principal amount of approximately $344 million as of September 30, 1985, including letters of credit which have been issued for the purpose of securing pollution control bond obligations and indemnifying third parties to tax benefit transactions against loss of certain tax benefits. This agreement requires maintenance of collateral equal to the $344 million principal amount. Such collateral has been provided by a pledge of a security interest in LTV Steel's receivables not sold to LTV Sales Finance Company ($178 million at September 30, 1985) and by certain of LTV Steel's inventories ($777 million gross inventory at September 30, 1985). Of the $344 million, LTV presently has $147 million recorded as a liability on its financial statements. This agreement currently requires LTV Steel to maintain a minimum Net Worth of $1.45 billion. For the period after December 31, 1985, the required minimum Net Worth is reduced by $150 million to $1.3 billion. As of September 30, 1985, LTV Steel's Net Worth was approximately $4 million in excess of the minimum. The LTV Steel Net Worth can be increased by earnings of LTV Steel or by capital contributions from LTV, if LTV chooses to and is able to do so, which are sufficient to maintain LTV Steel's Net Worth at the required level. A failure by LTV Steel to satisfy the Net Worth requirement and to remedy the shortfall would give the banks the right to declare an event of default and demand, at such time, the delivery of cash collateral in the amount of 100 percent of the then outstanding obligations.

Because of the foregoing, LTV Steel has had to cancel its borrowings based on traditional bank lending sources. Therefore, one of the sources for funding LTV Steel's staggering losses—that of bank borrowing—is not available to LTV Steel.

The second potential source for funding LTV Steel's losses would be public debt offerings by LTV. The availability of this source of funding is driven almost exclusively by the rating given to debt instruments by investor advisory companies such as Moody's, Duff and Phelps, Inc. and Standard & Poors. Under the Duff and Phelps' rating system, bonds are rated on a scale of 1 to 17 (17 being the worst rating). Under Moody's rating system, an investment level security would carry a Baaa rating. Under Standard & Poors' rating system, an investment level security is rated BBB. Attachment 2 to this affidavit shows LTV's bond rating history from each of these three investment rating firms. With only one exception, the ratings of all three rating institutions for each of LTV's bond/preferred stock issues has declined from the date of the merger to the present time. The exception is Moody's rating of LTV's senior and subordinated debt issues and, in that case, the rating has stayed the same since the merger. Attachments 3 and 4 to this affidavit contain excerpts from Duff & Phelps, Inc. and Moody's Corporate Credit Report explaining the reasons for their low ratings of LTV debt issues. Based on these noninvestment grade debt ratings, and recent financial results, direct access to the public debt market is foreclosed at the moment.

The last possible source for cash to fund losses is through the sale of assets. On May 17, 1985, LTV announced that it was initiating programs, including divestiture and joint venture programs, whereby LTV would seek to sell all or parts of various business units of its subsidiaries. Consistent with that announcement, Attachment 5 to this affidavit shows the assets which have been sold so far in 1985. Those asset sales have generated $131 million in cash. During the third quarter of 1985, LTV announced the offering for sale of LTV Steel Specialty Products Company, which is the nation's second largest producer of stainless steel sheet, strip and plate. LTV also announced the offering for sale of its wholly-owned subsidiary LTV Energy Products Company. Economic and market

conditions could very well affect LTV's ability to generate cash and to sell assets and the price realized for any assets that are sold. While selling assets does generate much needed cash (although not nearly enough to fund the net losses), some of the assets being sold generated positive net income. The sale of assets certainly cannot be considered a long-term solution to continuing losses as this option ultimately results in a slow liquidation of the company.

7. I would like to mention one other event which highlights the very difficult financial condition of LTV and LTV Steel. At the end of the second quarter of 1985 LTV had available to it under its bank lines only $130.3 million. Absent a waiver of the obligation, on September 15, 1985 LTV would have been required to pay $175 million to fund certain pension plan obligations primarily related to LTV Steel. LTV was forced to go to the IRS and the Pension Benefit Guaranty Corporation ("PBGC") and request a pension funding waiver. If the payment had been made, it would have eliminated the only readily available source of working capital for funding continued losses. After examining LTV's financial condition in detail, a funding waiver was granted.

8. As of September 30, 1985, LTV had only $201.3 million of bank line credit available. LTV Steel's nondiscretionary capital expenditures for 1986 are expected to be almost $200 million. Assuming no additional losses at LTV Steel for next year, and further assuming that LTV would be willing, even if it were able, to fund these capital expenditures, all of LTV's existing loan availability would have to go for that purpose. Under that scenario, no cash would be available to pay the interest and debt principal payments of the steel company, which clearly would be the first priority if any cash were available. If the capital funding does not occur, equipment must be shut down as it needs maintenance and replacement and the result would be a slow, painful withdrawal from certain product markets and

a continued weakening of LTV Steel's ability to compete. As stated above, LTV Steel presently has no other access to credit since all of its remaining assets have been pledged under various letters of credit and other debt instruments. That leaves LTV as the only continuing source to fund LTV Steel's continuing losses. Were those losses to continue over the long term, it is questionable whether LTV would be willing—even if it were able—to provide the necessary funding to maintain LTV Steel's present market positions.

III. OBJECTIONS TO THE BRENLIN PROPOSAL

9. I was part of LTV's management team which negotiated the terms and conditions of the Final Judgment which was ultimately entered by the Court in August of 1984. I have reviewed the terms and conditions of the Agreement of Purchase and Sale of Assets of Brenlin which is being sponsored by the trustee as the purchaser of the Gadsden plant. The Brenlin offer does not comply with the divestiture terms of the Final Judgment and should be rejected.

10. First of all, the purchase price is not payable on reasonable terms. Under the Brenlin proposal, all employees of the plant must be terminated by LTV Steel prior to the sale. For the reasons set forth in Mr. Weeks' affidavits, I have serious doubts that this business, in Brenlin's hands, can be a viable business. The purchase price offered by Brenlin, $57 million, is solely for inventory. Brenlin is paying *nothing* for any other assets. The $57 million are payable by $14 million in cash at the closing and delivery of a $43 million unsecured subordinated promissory note. The $14 million cash portion is subject to being reduced by the amount of inventory up to $14 million, that Brenlin elects not to take. In short, LTV will receive no cash at all if Brenlin elects to take no more than $43 million in inventory. Under the terms of the note, interest only will be paid for two years from the closing date. Thereafter, principal payments will be made over eight years. The corporate entity which will

issue the note will be a newly formed entity and presumably will have no assets other than the Gadsden plant. Since the note is totally unsecured and will be subordinated to senior debt in an unspecified amount, it is highly questionable whether LTV will ever receive payment for the inventory being sold. This is especially true since there is a substantial risk that the plant will ever be reopened once it is shut down. If that happens, or if business conditions cause the company to fail, LTV could receive no consideration at all for the Gadsden plant. That is not "a price (payable on reasonable terms)" as the Final Judgment requires.

Equally objectionable is Brenlin's proposal to pay for the inventory over a ten-year period. As I earlier stated, Brenlin is paying nothing for the assets. The inventory will be readily convertible to cash by Brenlin as it is sold. For Brenlin to gain the windfall use of over $43 million of cash for ten years is wrong. All inventory taken by Brenlin should be paid for in cash at the closing. To do otherwise would constitute payment to LTV on other than reasonable terms.

11. The Brenlin proposal requires LTV to build up substantial inventory prior to the closing. To the extent the inventory is greater than that required by the Brenlin proposal, LTV will be paid by adding to the promissory note. If the inventory is less than required, that reduction comes off the cash portion of the Brenlin offer. Also, Brenlin reserves the right to "cherry pick" the inventory so that LTV could be required to make a substantial cash investment in this inventory buildup but then have Brenlin elect not to take older, and less marketable inventory resulting in absolutely no compensation to LTV for its additional cash investment. It should be noted that it will be very difficult for LTV to sell any inventory not taken by Brenlin. This is true because the Gadsden plant is not located geographically close to any of our other existing steel plants and the products Gadsden produces are, for the most part, not the same

products produced and sold by LTV's other steel mills. In all probability, any inventory not taken by Brenlin would have to be sold for scrap value—possibly back to Brenlin. Under Brenlin's proposal, LTV would be required to produce 8,000 tons of finished product and 55,000 tons of slabs in excess of what would otherwise be available. The cost to LTV would be about $15.5 million. There is no requirement in the Final Judgment that LTV be required to build up this inventory, especially since we might end up receiving no compensation, which would be confiscatory.

12. LTV should not be required to sell Brenlin any accounts receivable. Under the Brenlin proposal, Brenlin would collect the accounts receivable and would repay LTV with a noninterest bearing note, payable one-half 30 days after the closing and one-half 60 days after the closing. LTV would keep all uncollectible accounts receivable. LTV would thereby lose the use of approximately $26 million for anywhere from 30 to 60 days before Brenlin compensates it for the accounts receivables. The Final Judgment specifically excludes accounts receivable from the definition of the assets required to be sold.

13. Under the Brenlin proposal, LTV is required to install a sixth stand in the hot strip mill at an estimated cost of $3.3 million in order to triple the capacity of the mill. No such requirement exists in the Final Judgment and, again, LTV will lose the use of cash which it badly needs in other parts of its business prior to the time it is reimbursed by Brenlin.

14. Under the Brenlin proposal, LTV is required to continue work on a mini-reline of the blast furnace until the closing. Thereafter, Brenlin has agreed to reimburse LTV for the costs expended within 30 days after the invoice is received after the closing. The Final Judgment does not require LTV to make any expenditures on the blast furnace caused by its deterioration associated with continuing usage. I specifically negotiated that provision in the Final Judgment because I knew this capital

outlay would be required. Notwithstanding LTV's position that it was not required to fund this mini-reline, LTV did agree with the Department of Justice to make such expenditures provided that the new purchaser of Gadsden reimbursed LTV for its past costs and funded directly any future costs after the Department selected the purchaser. If Brenlin is selected, Brenlin should fund this cost up-front as agreed.

15. The Brenlin proposal contains a covenant that LTV will not, for a period of three years after the closing date, compete with Brenlin in the sale of products to customers that have purchased Gadsden between August 2, 1984 and the date of the contract. This is patently objectionable. The whole purpose of the Final Judgment was to promote competition, not stifle it. There are a number of national customers who purchase steel products from various LTV Steel mills as well as from Gadsden. Under the terms of this covenant LTV Steel would not be able to sell to any of these national accounts. This is clearly anticompetitive and would substantially injure LTV Steel's already ailing business.

16. The Brenlin proposal also contains a covenant that LTV will not offer employment to any employee of the Gadsden plant earning in excess of $15,000 per year for a period of two years if those employees become employees of Brenlin or if Brenlin has offered them employment. No such restraint exists in the Final Judgment and LTV should be free to accept; as its employees, any person who does not wish to work for Brenlin.

17. Under the Brenlin proposal, LTV is required to give all of its causes of action to Brenlin. This is clearly not required by the Final Judgment and would result in potential windfalls to Brenlin.

18. Under the Brenlin proposal, Brenlin is permitted for a period of time to identify itself as a former division of The LTV Corporation. There is no requirement in the Final Judgment that the purchaser be allowed to use LTV's name in any way. I

believe legal exposure would be incurred by LTV since we would likely be named in any lawsuit involving products manufactured by Brenlin. While insurance coverage would possibly provide some protection, it is not sufficient.

19. Under the Brenlin proposal, LTV is required to represent that the assets being conveyed are sufficient in all material respects for the continuation of the present operation of the business in the ordinary course of the business. The Final Judgment does not require any such representation and the assets should be sold on an "as is, where is" basis. Under the Brenlin proposal, the plant will be shut down for possibly an extended period of time and potential damage to the equipment could result. LTV cannot make the required representation.

20. Under the Brenlin proposal, a representative of the purchaser would be allowed on the premises at Gadsden until the closing takes place with full freedom to communicate with all employees and to make customer and supplier contacts prior to the closing. The plant will be owned and operated by LTV prior to the closing. Having a new owner inside the premises would be disruptive and completely unmanageable. The Final Judgment does not require this access and it is objectionable.

21. The Brenlin proposal could be read as requiring LTV to pay the cost of corrective actions required to be taken with respect to the divested assets under applicable environmental and occupational health and safety laws or regulations. If that is the intent, the Final Judgment does not require any such costs to be funded by LTV and that aspect of the Brenlin offer is objectionable.

22. Finally, the Brenlin proposal would require LTV to terminate all of its Gadsden employees prior to the closing. The Final Judgment requires LTV to sell this business in such a way as to ensure that, as of the time of the divestiture, it can reasonably be anticipated that Gadsden can and will be operated by the purchaser as a viable, ongoing business. The termination

of all employees prior to the closing casts serious doubts on whether this business can be operated as a viable, ongoing business in the future. Since the termination of employees prior to closing creates a serious question as to the viability of the plant, LTV should not be required to terminate its employees.

IV. THE FINANCIAL IMPACT ON LTV OF THE BRENLIN PROPOSAL

23. The sale of the Gadsden plant to Brenlin would result in grievous injury to LTV. Attachments 6 and 7 to this affidavit detail the financial impact on LTV under the Brenlin proposal. In the first two years after the sale to Brenlin, the cash financial impact on LTV will be $99.2 million. The total cash financial impact of the Brenlin proposal on LTV over the years is $263.5 million. Additional cash penalties would be incurred that cannot be calculated. Those penalties, would result from:

a. Conveyance of legal causes of action;

b. Interest on funds required for the mini-reline;

c. Interest on the investment for installation of the sixth stand;

d. The covenant not to compete;

e. The covenant not to rehire; and

f. Costs of post-closing funding for OSHA/ Environmental compliance.

24. While I was cognizant of the general amount of the potential cash penalty that might result under a Final Judgment divestiture at the time LTV consented to the Judgment, I did not and could not have foreseen the disastrous operating results that the merged steel company has sustained since the acquisition and therefore the grave implication of that penalty.

25. It is questionable whether LTV could survive such a crushing cash financial impact at the present time. One thing is certain. Even if LTV were somehow able to find a way to fund

this cash impact, the result would be a severely weakened LTV Steel.

26. I do not believe that this result was ever intended by the Department of Justice or the Court. The Brenlin proposal should be turned down because of the grievous injury that would be inflicted on LTV.

V. THE UNION SPONSORED ESOP SHOULD BE SELECTED AS PURCHASER

27. The union sponsored Employee Stock Ownership Plan should be selected as the purchaser of the Gadsden plant.

28. The ESOP buyout provides for payments to LTV of the following:

a. Cash of $15 million in two equal installments, one at closing, the other with interest at prime plus 3/4 of 1 percent, 60 days after the reline is completed.

b. A Working Capital note of approximately $20-25 million with interest quarterly beginning April 1, 1986, at prime plus 2 percent or Gulf State Steel Corporation's borrowing rate, with principal payments over five years beginning January 1, 1987, contingent on earnings. However, LTV has agreed with the ESOP's present lender that no principal or interest payments will be made for the first two years.

c. A Fixed Asset note of $23 million with interest at 10 percent accumulated for five years and that total payable, with interest quarterly beginning April 1, 1991, in 10 annual installments beginning January 1, 1992.

d. An equity participation evidenced by a note equal to 10 percent of the book value of the Company at December 31, 1990 paid out of earnings but with a balloon for the balance, if any, at December 31, 2000. No interest is payable on the outstanding balance but the note is

convertible into 10 percent of equity on a pre-1991 sale of the Company or public offering.

29. The ESOP buyout provides for a new labor contract resulting in $5.00/hour (16-2/3 percent) reduced labor costs and elimination of 200 hourly and 40 salary jobs. The ESOP will assume various contracts (Oxygen and Utilities) and the pension and welfare benefit plans on an agreed upon basis. LTV will guarantee to pay certain specific benefits of the ongoing Company's retired employees if the Company and PBGC do not cover them.

30. The ESOP has contracted with LTV Steel to purchase, for a five-year period, 75 percent of its ore requirements delivered to Mobile at a specified price for 1986 and indexed thereafter. LTV Steel will hold the ore for the Company's account and bill on shipment to Gadsden. Also, the ESOP has contracted for a five-year period to buy 100 percent of its low volume and 60 percent of its high volume coal requirements at cost plus $2.00/ton and cost, respectively.

31. By contrast to the ESOP, the Brenlin proposal would have a dramatically detrimental effect on LTV. For example, it requires termination of all employees, thereby triggering a huge pension and welfare benefits liability for LTV—whereas the ESOP retains all but 240 employees who voluntarily retire, leaving LTV contingently liable only for certain pension liabilities in the event the ESOP or the PBGC does not pay them. Also, the Brenlin proposal will require LTV to terminate a number of oxygen and utility contracts, each of which contain termination penalties; the ESOP does not require such termination. Under the Brenlin proposal, there is no commitment to purchase iron ore and coal from LTV. LTV has excess iron ore and coal and owns two ships which were built by Republic solely to deliver iron ore to Gadsden. The ESOP has agreed to purchase some of its ore and coal requirements from LTV for a period of time. Furthermore,

the Brenlin proposal calls for the transfer of certain rolls, molds and factory supplies to Brenlin, but, contrary to LTV's normal accounting practices, excludes them from inventory, with the result that Brenlin does not pay for them—whereas those items are included in the selling price to the ESOP. These are just some of the items in the Brenlin proposal that work to LTV's substantial detriment.

32. Attachments 8 and 9 to this affidavit set forth the increased cash financial impact on LTV of the Brenlin proposal as compared to the ESOP proposal. In the first two years the Brenlin proposal will cost LTV $115.4 million more than the ESOP proposal. The total cash financial impact on LTV is $263 million more under the Brenlin proposal than under the ESOP proposal.

33. Although there is grave doubt that the Brenlin proposal will create a viable entity (for the reasons set forth in the affidavits of W. Lawrence Weeks), even if that proposal were viable, there would be two viable offers for the Gadsden plant, one of which would inflict grievous financial injury on LTV (the Brenlin proposal) while the other would not (the ESOP). Since the Final Judgment was not designed to punish LTV but to ensure that an effective competitor was created, the ESOP proposal should clearly be selected over the Brenlin proposal.

/s/_____
James J. Paulos
Executive Vice President

)
District of Columbia) ss.:
)

Personally appeared before me, a notary public in and for said county and state this 26th day of November, 1985 and the above named James J. Paulos who, being duly sworn, did depose and

say that he was authorized to make the foregoing statement and that the averments therein are true and correct according to his best knowledge and belief.

Witness my hand and official seal on the day and year last aforesaid.

/s/_____
Notary Public

My Commission expires April 14, 1989.

APPENDIX T

EXHIBIT V

1. LTV makes no representation or warranty that it is in compliance with all environmental laws and regulations applicable to the Business in all material respects. The dynamic nature of work practices and operational conditions at the Gadsden plant can result in non-compliance with environmental laws and regulations at any given time.

2. NONCOMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS.

   A. The Gadsden plant is currently not in compliance with water pollution control regulations adopted under the Federal Water Pollution Control Act (FWPCA) which require installation of Best Available (control) Technology (BAT) by July 1, 1984. Such technology has not been installed. See discussion below in Section (3).

   B. The Gadsden plant has from time-to-time been notified by various federal, state and local governmental agencies that its steelmaking and related operations were not in compliance with various environmental laws and regulations. The involved governmental agency or agencies may assert against Newco that the violations which are the subject of the below listed notifications are continuing despite corrective action that may have been implemented.

Notices of Violation

Date	Agency	Nature
July 14, 1975	AAPCC	Excessive emissions-coke battery No. 3

November 18, 1977	U.S. EPA	NPDES permit violations
April 24, 1977	U.S. EPA	Excessive emissions from coke battery No. 2 and BOF
April 26, 1978	AAPCC	Excessive emissions-coke battery No. 2
April 28, 1978	AAPCC	Excessive emissions coke battery No. 2 blast furnace, BOF Shop and front-end loader
March 30, 1979	U.S. EPA	Excessive emissions-BOF shop
June 8, 1979	AAPCC	Excessive emissions-material storage piles
December 11, 1979	U.S. EPA	NPDES permit violations (ammonia and total suspended solids)
March 14, 1980	AWIC	NPDES permit violations (ammonia)
April 2, 1980	AWIC	NPDES permit violations (ammonia)
August 4, 1980	AWIC	NPDES permit violations (total suspended solids)
August 18, 1982	ADOPH	Hazardous waste management deficiencies (coal tar decanter sludge-coke plant)
May 23, 1984	U.S. Coast Guard	Oil Spill

August 29, 1984	ADEM	Excessive emissions-coke batteries Nos. 2 and 3 combustion stacks
January 9, 1986	ADEM	Excessive emissions-coke batteries Nos. 2 and 3 and BOF shop.

C. Gulf States Steel Corporation and its predecessor, Republic Steel Corporation, have from time-to-time, as required by law, reported (to the appropriate governmental entity) instances of noncompliance with environmental requirements applicable to the Business as conducted at the Gadsden plant. These reports, which are listed below, discuss instances of noncompliance which the involved governmental agency or agencies may assert against Newco as continuing violations despite corrective action that may have been implemented.

Date of Reports	Agency	Nature
February 25, 1980	U.S. EPA	Cyanide violation (2 days)
March 14, 1980	AWIC	Ammonia violation
March 17, 1980	U.S. EPA	Ammonia violation
April 10, 1980	U.S. EPA	TSS violation
June 6, 1980	AWIC	Ammonia violation
July 17, 1980	AWIC	Ammonia violation
August 15, 1980	AWIC	Ammonia violation
October 6, 1980	AWIC	Ammonia violation (2 days)
November 3, 1980	AWIC	Ammonia violation

November 25, 1980	AWIC	Ammonia violation
December 1, 1980	AWIC	Ammonia violation
December 18, 1980	AWIC	Ammonia violation
January 28, 1981	AWIC	Ammonia violation
February 26, 1981	AWIC	Ammonia violation
December 11, 1981	AWIC	Ammonia violation
January 19, 1982	AWIC	Ammonia violation (3 days)
January 27, 1982	AWIC	Phenol violation (2 days)
February 24, 1982	AWIC	Cyanide violation
May 4, 1982	AWIC	TSS violation
May 10, 1982	AWIC	Ammonia violation
July 12, 1982	AWIC	Ammonia violation
July 20, 1982	AWIC	Ammonia violation
July 26, 1982	AWIC	Ammonia violation
September 20, 1982	AWIC	Ammonia violation (2 days)
October 27, 1982	ADEM	Phenol violation
December 22, 1982	ADEM	Phenol violation (3 days)
February 8, 1983	ADEM	Phenol violation
February 25, 1983	ADEM	Phenol violation
March 10, 1983	ADEM	Phenol violation
April 5, 1983	ADEM	Phenol violation
April 18, 1983	ADEM	TSS violation (2 days)
May 18, 1983	ADEM	TSS violation

May 23, 1983	ADEM	TSS violation
June 17, 1983	ADEM	Ammonia violation
August 2, 1983	ADEM	Ammonia violation (3 days)
August 13, 1983	ADEM	Ammonia violation (2 days)
October 13, 1983	ADEM	Ammonia violation
November 28, 1983	ADEM	Phenol violation Ammonia violation (2 days)
December 2, 1983	ADEM	TSS violation (3 days)
December 9, 1983	ADEM	TSS violation (3 days)
January 17, 1984	ADEM	Phenol violation (9 days) TSS violation (2 days) Ammonia violation (2 days)
January 31, 1984	ADEM	TSS violation
March 5, 1984	ADEM	TSS violation
June 8, 1984	ADEM	Ammonia violation (1 day)
June 18, 1984	ADEM	Zinc violation (3 days)
August 6, 1984	ADEM	TSS violation (2 days)
August 31, 1984	ADEM	TSS violation (2 days)

February 8, 1985	ADEM	Phenol violation (5 days) Iron violation (1 day) TSS violation (1 day)
March 5, 1985	ADEM	TSS violation
June 19, 1985	ADEM	TSS violation
August 2, 1985	ADEM	TSS violation

D. Gulf States Steel Corporation and the Gadsden plant facilities are subject to the following agreements, stipulations and orders, violation of which may subject Newco to civil and criminal penalties as provided by law.

1. Final Order entered March 21, 1980 in the U.S. District Court (N.D., Alabama) in *Alabama Air Pollution Control Commission, et. al v. Republic Steel Corporation* (Civil Action No. 78-G-1117-M), as amended by U.S. District Court on April 16, 1980, and further amended by U.S. Court of Appeals (5th Circuit) in decision dated May 29, 1981 in *Alabama Air Pollution Control Commission v. Republic Steel Corporation* (No. 80-7328). (BOF Shop)

2. Order pursuant to Section 309, Federal Water Pollution Control Act issued by the U.S. Environmental Protection Agency on November 18, 1977. (all facilities)

3. Delayed Compliance Order dated June 9, 1978 issued by the Alabama Air Pollution Control Commission. (Coke Battery No. 2)

4. Consent Decree dated December 27, 1982 entered in the Circuit Court, Etowah County in *Alabama Department of Environmental Management v. Republic Steel Corporation* (Case No. CV-79-001687-S). (Coke Batteries Nos. 2 and 3)

5. Order No. 84-013-WP issued on April 18, 1984 by the Alabama Department of Environmental Management. (all facilities)

6. Order issued on May 14, 1985 by the U.S. Court of Appeals (11th Circuit) in *Republic Steel Corporation v. U.S. Environmental Protection Agency* (Case No. 79-2329). (Coke Batteries Nos. 2 and 3)

7. Abatement Order No. 76-00330-601 dated March 30, 1976 issued by Alabama Air Pollution Control Commission. (Coke Battery No. 2)

8. Abatement Order No. 76-00330-601 dated March 30, 1976 issued by Alabama Air Pollution Control Commission. (continuous hot dip galvanizing line)

E. Wastewater discharge monitoring reports are routinely submitted to various environment agencies including the Alabama Department of Environmental Management or its predecessors. These reports, which are listed below, may show violations of applicable water pollution control regulations which the involved governmental agency or agencies may assert against Newco as continuing violations despite corrective action that may have been implemented.

Date	Agency	Nature
February 21, 1980	ADEM	Monthly wastewater monitoring report
March 11, 1980	ADEM	*
April 14, 1980	ADEM	*
April 15, 1980	U.S. EPA	Quarterly wastewater monitoring report
May 14, 1980	ADEM	Monthly wastewater monitoring report
June 13, 1980	ADEM	*
July 21, 1980	ADEM	*
August 1, 1980	AWIC	Quaterly wasterwater monitoring report
August 13, 1980	ADEM	Monthly wastewater monitoring report
September 16, 1980	ADEM	*
October 15, 1980	ADEM	*
October 20, 1980	AWIC	Quarterly wastewater monitoring report
November 12, 1980	ADEM	Monthly wastewater monitoring report
December 16, 1980	ADEM	*
January 13, 1981	ADEM	*
January 15, 1981	AWIC	Quarterly wastewater monitoring report
February 13, 1981	ADEM	Monthly wastewater monitoring report
March 16, 1981	ADEM	*

April 9, 1981	ADEM	*
April 14, 1981	AWIC	Quarterly wastewater monitoring report
May 11, 1981	ADEM	Monthly wastewater monitoring report
June 17, 1981	ADEM	*
July 17, 1981	ADEM	*
July 29, 1981	AWIC	Quarterly wastewater monitoring report
August 13, 1981	ADEM	Monthly wastewater monitoring report
September 14, 1981	ADEM	*
October 15, 1981	ADEM	*
October 23, 1981	AWIC	Quarterly wastewater monitoring report
November 9, 1981	ADEM	Monthly wastewater monitoring report
December 15, 1981	ADEM	*
January 14, 1982	ADEM	*
January 20, 1982	AWIC	Quarterly wastewater monitoring report
February 9, 1982	ADEM	Monthly wastewater monitoring report
March 15, 1982	ADEM	*
April 13, 1982	ADEM	*
April 23, 1982	AWIC	Quarterly wastewater monitoring report
May 20, 1982	ADEM	Monthly wastewater monitoring report

June 15, 1982	ADEM	*
July 13, 1982	ADEM	*
July 15, 1982	AWIC	Quarterly wastewater monitoring report
August 16, 1982	ADEM	Monthly wastewater monitoring report
September 15, 1982	ADEM	*
October 12, 1982	ADEM	*
October 22, 1982	ADEM	Quarterly wastewater monitoring report
November 12, 1982	ADEM	Monthly wastewater monitoring report
December 13, 1982	ADEM	*
January 13, 1983	ADEM	*
January 19, 1983	ADEM	Quarterly wastewater monitoring report
February 21, 1983	ADEM	Monthly wastewater monitoring report
March 15, 1983	ADEM	*
April 19, 1983	ADEM	*
April 28, 1983	ADEM	Quarterly wastewater monitoring report
May 16, 1983	ADEM	Monthly wastewater monitoring report
June 16, 1983	ADEM	*
July 18, 1983	ADEM	*
August 16, 1983	ADEM	*
September 14, 1983	ADEM	*

October 11, 1983	ADEM	*
November 7, 1983	ADEM	*
December 12, 1983	ADEM	*
January 18, 1984	ADEM	*
February 17, 1984	ADEM	*
March 13, 1984	ADEM	*
April 12, 1984	ADEM	*
May 7, 1984	ADEM	*
June 20, 1984	ADEM	*
July 3, 1984	ADEM	*
August 14, 1984	ADEM	*
September 13, 1984	ADEM	*
October 12, 1984	ADEM	*
November 9, 1984	ADEM	*
December 14, 1984	ADEM	Monthly wastewater monitoring report
January 9, 1985	ADEM	*
February 12, 1985	ADEM	*
March 11, 1985	ADEM	*
April 1, 1985	ADEM	*
May 8, 1985	ADEM	*
June 4, 1985	ADEM	*
July 15, 1985	ADEM	*
August 7, 1985	ADEM	*
September 5, 1985	ADEM	*
October 7, 1985	ADEM	*
November 4, 1985	ADEM	*

November 6, 1985	ADEM	*
December 2, 1985	ADEM	*
January 7, 1986	ADEM	*

F. Gulf States Steel Corporation or its predecessor, Republic Steel Corporation, have from time-to-time received complaints from various local residents about windblown dust and other air emissions from the Gadsden plant facilities, vibration caused by plant facilities, wastewater discharges creating a mosquito-infested swamp, fish kills, and other nuisances. Such complaints have been received from the following individuals who may assert that such problems are continuing despite corrective action that may have been implemented.

Frank Westcott
Mr. & Mrs. Shivley
W. G. Sprayberry
Fred Beattles
Kathy Barron
James Hicks
Roger Traylor
Joe McCartney
Cecil Dorsett
Dorothy Dorsett
Sheila Bone
Billy Griffin
Delores Griffin
Dorothy Hester
John LeCroy
Violet Trussel
Opal Wells
Royce Wood
Regina Wood
Mrs. John Baker

Mrs. Manual Baker, Sr.
Mrs. Opal Baker
Eula Hall
Robert Hanna
Judy Hanna
Annie Knowles
Harold Pannell
Dorothy Pannell
Robert Whitfield
Michael Bennett
Deborah Bennett
Ralph Scott
Michael Manner
Lisa Manner
Sherman Little
Albert Collier
Jane Collier
Charles Gilbert
Patricia Gilbert
Robin Johnson
Barbara Johnson
Armistead Stewart
Olivia Stewart
Teddy Jones
Kathryn Jones
Edwin Calvert
Tina Calvert

3. SCHEDULE OF CORRECTIVE ACTION TO BE IMPLEMENTED.

Water pollution control facilities estimated to cost at least $5.2 million (1982 dollars) will be required to comply with the so-called BAT water pollution control regulations generally applicable to the steel industry. In addition, these facilities may cost in excess of $20 million (1982 dollars)

if a variance from the so-called BAT water pollution control regulations is not obtained. A timely application for this variance, known as a Central Treatment Plant (CTP) Variance, was submitted to the U.S. Environmental Protection Agency. To date the U.S. EPA has taken no action on that application. If the CTP variance is not obtained, the owner of the Gadsden plant facility may also be subject to civil and criminal penalties including fines of up to $10,000 per day (or more) since July 1, 1984 and/or injunctive relief such as forced shut-down of steelmaking operations and/or installation of required water pollution control facilities on an expedited schedule the length of which cannot be predicted at the present time.

4. DESCRIPTION OF ALL MATERIAL MEMORANDA, REPORTS AND CORRESPONDENCE BY OR TO LTV CONCERNING MATERIAL ENVIRONMENTAL MATTERS SINCE JANUARY 1, 1980.

This information is contained within the environmental files and records kept in the ordinary course of business by personnel at the Gadsden plant having responsibility for environmental matters. These files and records are contained within three 4-drawer file cabinets located in the Chief Engineers office, Room 17, at the Gadsden plant and are available for inspection by NEWCO at any time prior to the Closing.

APPENDIX U

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

4APT-AC

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Gulf States Steel Corporation
Dec. 16, 1987
Engineering Department
Gadsden, Alabama

Mr. Kenneth Means
Chief Engineer
Gadsden Steel Corporation
(Gulf States Steel, Inc.)
174 South 26th Street
Gadsden, Alabama 35904-1935

Dear Mr. Means:

Pursuant to Section 113(a)(1) of the Clean Air Act (the Act), 42 U.S.C. §7413(a)(1), you are hereby notified that based upon information obtained by the United States Environmental Protection Agency (EPA) during the August 25-26, 1987 inspection, EPA has found the Gadsden Steel Corporation to be

operating its facility in violation of the Alabama SIP regulations and of the pending regulations currently being reviewed by EPA Headquarters. Specifically, the BOF shop and blast furnace roof monitors are in violation of regulation 4.1.1 which limits visible emissions to twenty (20) percent opacity with an allowable discharge for a period or periods aggregating not more than three (3) minutes in any sixty (60) minutes of air contaminants with opacity not greater than sixty (60) percent. The combustion stacks are in violation of regulation 4.9.8 which limits visible emissions to twenty (20) percent opacity for periods aggregating not more than three (3) minutes in any consecutive sixty (60) minutes. In addition, the charging operation is in violation of regulation 4.9.11 which allows a maximum of ninety-four (94) seconds of visible emissions greater than zero (0) percent opacity during five (5) consecutive charges and the pushing operation is in violation of regulation 4.9.12 which requires a push emissions capture device and limits visible emissions to twenty (20) percent opacity. Violations of the aforementioned regulations are as follows:

Source	**Regulation**	**Emission Readings**
BOF Shop Roof Monitor	4.1.1	35 readings > 20% (after 3 minute exemption)
Blast Furnace Roof Monitor	4.1.1	36 readings > 20% (after 3 minute exemption)
#2 Combustion Stack	4.9.8	20 readings > 20% (after 3 minute exemption)
#3 Combustion Stack	4.9.8	15 readings > 20% 22 readings > 20% 39 readings > 20% 55 readings > 20% (after 3 minute exemption)
Charging #2 Coke Battery	4.9.11	378 sec > 0% (4 consecutive charges)

		456 sec > 0% (5 consecutive charges)
Charging #3 Coke Battery	4.9.11	308 sec > 0% (5 consecutive charges) 130 sec > 0% (3 consecutive charges)
Pushing #2 Coke Battery	4.9.12	No controls, 8 of 8 pushes with opacity > 20%
Pushing #3 Coke Battery	4.9.12	No controls, 13 of 13 pushes with opacity > 20%

The above cited regulation 4.9.8 is a part of the Alabama SIP regulations which was federally approved in 40 Fed. Reg. 39503 (August 28, 1975). Regulations 4.9.11 and 4.9.12 are also a part of the Alabama SIP regulations and were federally approved in 44 Fed. Reg. 20079 (April 4, 1979). The current Alabama Department of Environmental Management (ADEM) regulation 4.1.1. (June 5, 1979), limits visible emissions to twenty (20) percent opacity as determined by a six (6) minute average is not federally approved and subsequently cannot be enforced by EPA and does not apply in this case. The regulation 4.1.1. (May 31, 1972) which does apply and can be enforced in this case was approved in 37 Fed. Reg. 10842 (May 31, 1972), and as previously stated, limits visible emissions to twenty (20) percent opacity with an allowable discharge for a period or period aggregating not more than three (3) minutes in any sixty (60) minutes of air contaminants with opacity not greater than sixty (60) percent.

Because the Gadsden Steel Corporation has been listed as a significant violator since October, 1984, as well as the fact that the facility is not in compliance with the more lenient pending regulations, EPA feels that formal enforcement action is appropriate. Currently, ADEM is considered the lead agency in providing an adequate resolution to the aforementioned viola-

tions. EPA will closely monitor the State's efforts to bring your facility into compliance in accordance with the Alabama/EPA Enforcement Agreement Memorandum of Understanding that is presently in place. Under that agreement if ADEM proceeds with satisfactory action, EPA may defer federal enforcement action so long as your facility meets the terms of the agency's administrative or judicial order, and achieves final compliance with the applicable regulations. Therefore, the Gadsden Steel Corporation should make every effort to resolve said violations in an expeditious manner with ADEM in order to avoid federal intervention.

However, if ADEM does not proceed with a satisfactory enforcement action and/or said violations continue or recur, EPA may issue an Administrative Order requiring immediate compliance with Section 113(a) of the Act, 42 U.S.C. §7413(a). If immediate compliance is not possible, or if EPA determines that judicial action is appropriate, EPA will commence a civil action pursuant to Section 113(b) of the Act, 42 U.S.C. §7413(b), or a criminal prosecution pursuant to Section 113(c) of the Act, 42 U.S.C. §7413(c), or both.

Furthermore, pursuant to Section 306 of the Act, 42 U.S.C. §7606, Executive Order 11738, and EPA regulations issued thereunder in 40 C.F.R. Part 15, facilities to be utilized in fulfilling federal contracts, grants, and loans must be in full compliance with all standards established pursuant to the Act. A violation of the clean air standards outlined in this notification may result in your company becoming ineligible for participation in any work associated with a federal contract, grant, or loan.

In addition to the aforementioned sanctions, any failure of the above source to achieve and/or maintain final compliance with any applicable emission limitations under the Alabama SIP may subject your facility to an administratively assessed non-compliance penalty. This penalty would be assessed pursuant

to the requirements of Section 120 of the Act, 42 U.S.C. §7420, and regulations promulgated pursuant thereto in 45 Fed. Reg. 50086, July 28, 1980 (40 C.F.R. Part 66).

If you have any questions concerning this letter, please feel free to call Mr. James T. Wilburn, Chief, Air Compliance Branch at (404) 347-2904 or Ms. Angelia Souder, Attorney, Office of Regional Counsel at (404) 347-2335.

Sincerely yours,

/s/

Winston A. Smith, Director
Air, Pesticides and Toxics
Management Division

cc: Mr. Richard E. Grusnick, Chief
Air Division
Alabama Department of
Environmental Management

APPENDIX V

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

4APT-AC
NOV. 17, 1987
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard E. Grusnick, Chief
Air Division
Alabama Department of
Environmental Management
1751 Federal Drive
Montgomery, Alabama 36130

Dear Mr. Grusnick:

As you know on August 25-26, 1987, Reginald Barrino, of EPA, Robert Geddis and Richard Schutt, of Air Pollution Regulatory Services, and John Hughes, of your staff, conducted an on-site inspection at Gadsden Steel. In addition to the on-site inspection, off-site observations were also made by Reginald Barrino, Robert Geddis and Richard Schutt. The on-site observations documented violations of the coke battery charging and pushing operations as well as the BOF and blast furnace roof monitor emissions. During the off-site observations, violations of the combustion stack regulation were documented while the on-site observations did not show violations. Enclosed are

copies of two inspection reports: the Inspection Report for the on-site inspection on August 25-26, 1987, and the Off-Site vs. On-Site Observations report.

During both the on-site and off-site observations, violations of the Alabama SIP regulations which were federally approved August 28, 1975, (except for pushing), of the RACT regulations which were federally approved April 4, 1979, but never previously enforced, and of the regulations currently being reviewed by EPA Headquarters were documented. The documented violations are summarized in the five attached tables.

Violations of the RACT regulations for pushing and charging which were federally approved April 4, 1979, are listed in Tables I and II. Violations of both regulation 4.9.11 for charging and regulation 4.9.12 for pushing were documented on coke batteries #2 and #3.

Table III lists the violations of regulation 4.9.8. documented on the combustion stacks for both the #2 and #3 batteries. Regulation 4.9.8. has remained the same since the coke battery regulations were originally approved in 1975. Therefore, the violations listed in Table III are violations of the pending regulations as well as the regulations which are currently federally enforceable.

Violations of the general visible emission regulation 4.1.1 documented on the BOF shop and blast furnace roof monitors are given in Table IV.

Table V lists violations of the pending regulations which are different from those regulations which are currently federally enforceable. Violations of regulation 4.9.4 for pushing were documented on coke batteries #2 and #3 and of regulation 4.17.1 for the BOF shop roof monitor. Due to agency questions about the interpretation of the pending regulations, a determination cannot be made regarding the sufficiency of the

field data to evaluate the compliance status of coke batteries #2 and #3 with regulation 4.9.3 for charging. The observation procedures do not clearly define the four hour observation period. Therefore, clarification of the observation procedures and additional data will be required in order to evaluate compliance of the coke batteries with the pending regulation for charging.

Region IV is concerned about this facility since it has been carried as a significant violator since October, 1984, and Day 120 was in January of 1985. The State has periodically documented violations at various emission points in the recent past. However, we are not aware of any specific enforcement action with penalties initiated by the State to resolve the problems at this facility. We are also aware of the past agreements not to enforce the RACT regulations for pushing and charging as well as the difference of opinion between our agencies regarding the application of regulation 4.1.1 to roof monitor emissions. However, because violations of the relaxed regulation for pushing have been documented and because legal challenges are no longer binding, EPA will not continue to withhold enforcement of the RACT regulations for pushing and charging. Also, a regulation which specifically exempts the blast furnace roof monitor from any opacity limit must be added to the SIP revision in order to preclude EPA's enforcement of regulation 4.1.1 at this emission point.

Therefore, EPA feels that formal enforcement action is appropriate especially when one considers the length of time this source has been an unresolved significant violator as well as the fact that this source is not in compliance with the more lenient pending regulations. EPA intends to issue an NOV in the near future. The NOV will cite the violations of regulations 4.1.1 for visible emissions from the BOF shop and blast furnace roof monitors, 4.9.8 for combustion stacks, 4.9.11 for charging, and 4.9.12 for pushing.

Within 30 days of the issuance of the EPA NOV, ADEM should submit to EPA a comprehensive plan outlining the specific steps, including timeliness, which ADEM intends to take in order to resolve this matter in accordance with the T&A guidance. This plan should include such items as issuing an NOV, scheduling of a show cause meeting, and preparing a Consent Order with penalties. The monthly enforcement conference call notes indicate that while ADEM has found frequent violations and issued NOVs, no action has been taken to attain a clear resolution of this matter. Therefore, for EPA to continue to defer the enforcement lead to ADEM in this case, ADEM must clearly indicate that decisive and formal enforcement action will be taken to reach a resolution that is consistent with the T&A guidance.

If you have any questions, please do not hesitate to call Richard S. DuBose, Chief, Southern Compliance Section at (404) 347-2904.

Sincerely yours,

/s/

Winston A. Smith, Director
Air, Pesticides and Toxic
Management Division

TABLE I

VIOLATIONS OF 4.9.11* — CHARGING — RACT

Source	Date	Time		Visible Emission Readings
#2 Coke Battery	8/25/87	10:05am-12:26pm	378	sec > 0%, 4 consecutive charges
#2 Coke Battery	8/25/87	12:51pm-2:01pm	456	sec > 0%, 5 consecutive charges
#3 Coke Battery	8/25/87	11:20am-12:01pm	308	sec > 0%, 5 consecutive charges
#3 Coke Battery	8/25/87	12:17pm-3:17pm	130	sec > 0%, 3 consecutive charges

*Allowed 94 seconds of visible emissions > 0% during 5 consecutive charges.

TABLE II

VIOLATIONS OF 4.9.12* — PUSHING — RACT

Source	Date	Time		Visible Emission Readings
#2 Coke Battery	8/25/87	10:07am-1:58pm	No	controls, 8 out of 8 pushes w/ opacity > 20%
#3 Coke Battery	8/25/87	11:11am-3:31pm	No	controls, 13 out of 13 pushes w/ opacity > 20%

*Controls, no visible emissions > 20% opacity

TABLE III

VIOLATIONS OF 4.9.8* — COMBUSTION STACKS

Source	Date	Time		Visible Emission Readings
#2 Coke Battery	8/25/87	7:26pm-7:39pm	20	readings > 20% after 3 minute exemption
#3 Coke Battery	8/24/87	6:20pm-6:28pm	15	readings > 20% after 3 minute exemption
#3 Coke Battery	8/24/87	7:09pm-7:23pm	22	readings > 20% after 3 minute exemption
#3 Coke Battery	8/25/87	7:08pm-7:26pm	39	readings > 20% after 3 minute exemption
#3 Coke Battery	8/25/87	6:56am-7:16am	55	readings > 20% after 3 minute exemption

*20% opacity limit, aggregate method, 3 minutes out of 60 minutes exemption

TABLE IV

VIOLATIONS OF 4.1.1* — VISIBLE EMISSIONS (ROOF MONITORS)

Source	Date	Time		Visible Emission Readings
BOF Shop Roof Monitor	8/26/87	12:14pm-1:13pm	35	readings > 20% after 3 minute exemption, 7 of the 35 readings > 60%
Blast Furnace Roof Monitor	8/26/87	1:30pm-2:29pm	36	total readings > 20%, 11 of the 36 readings > 60%

*20% opacity limit, aggregate method, except 3 minutes out of 60 minutes not > 60%

TABLE V

VIOLATIONS OF PENDING REGULATIONS

Source	Date	Time	Emission Readings
Coke Battery #2	8/25/87	10:07am-1:58pm	4.9.4 (Pushing)*	6 pushes > 40% in 4 hrs for an avg. of 1.5 pushes/battery hour
Coke Battery #3	8/25/87	11:11am-3:03pm	4.9.4 (Pushing)	7 pushes > 40% in 4 hrs for an avg. of 1.75 pushes/battery hour
BOF Shop Roof Monitor	8/26/87	12:16pm-1:13pm	4.17.1 (3 min.** rolling average)	11 - 3 minute rolling avgs. > 20% ranging from 22.1% to 62.5%

*One push > 40% opacity per battery per hour, averaged over a 4 hour observation period

**No three minute rolling average > 20% opacity

APPENDIX W

EXHIBIT 1

STATE OF ALABAMA)
COUNTY OF MONTGOMERY)

AFFIDAVIT

I, John Poole, being duly sworn, deposes and states as follows:

1. My name is John Poole. I am Chief of the Industrial Branch of the Water Division of the Alabama Department of Environmental Management (ADEM). My office is located at 1751 Congressman Dickinson Drive in Montgomery, Alabama.

2. I am over the age of 19 years and am qualified to testify and have personal knowledge of the matters stated herein.

3. The following information is submitted for the court's consideration with regard to the property and facility now owned by GSSI, Inc., in Gadsden, Alabama:

A. LTV did not apply for an NPDES (National Pollutant Discharge Elimination System) permit for the Gadsden facility following its merger with Republic Steel. As such the facility violated state and federal laws by discharging wastewater without a permit.

B. Since the permit limitations placed on Gulf States Steel in 1987 were based on water quality criteria, had LTV applied for an NPDES Permit, its permit limits would have been at least as stringent as those imposed on Gulf States.

/s/_____
John Poole, Affiant

Sworn to and subscribed before me this 31st day of July, 1991.

/s/_____
Notary Public

APPENDIX X

EXHIBIT 3

STATE OF ALABAMA
COUNTY OF MONTGOMERY

AFFIDAVIT

I, Richard G. Grusnick, being duly sworn, deposes and states as follows:

1. My name is Richard G. Grusnick. I am Chief of the Air Division of the Alabama Department of Environmental Management (ADEM). My office is located at 1751 Congressman Dickinson Drive in Montgomery, Alabama.

2. I am over the age of 19 years and am qualified to testify and have personal knowledge of the matters stated herein.

3. The following information is submitted for the court's consideration with regard to the property and facility now owned by GSSI, Inc. in Gadsden, Alabama:

A. Prior to January 31, 1986, the subject plant in Gadsden, Alabama was owned by LTV Corporation.

B. Under LTV's ownership, violations were cited by ADEM in the operation of the two coke batteries and the Basic Oxygen Furnace (BOF). These violations were for leaks from the doors, lids, and piping on the #2 and #3 Coke Batteries and from opacity violations from the underfire stacks on both batteries.

C. It is likely that pushing and charging operations at the two batteries were not in compliance.

D. The BOF was cited for opacity violations from the Electrostatic Precipitator (ESP) stack, which controls the particulate emissions from the BOF, and for opacity violations from the vent on the building which houses the BOF.

E. Before the purchase of the plant by GSSI, no substantial corrective measures had been implemented to correct the continuing violations at the coke batteries and the BOF.

F. After the purchase by GSSI, a Consent Decree between GSSI and ADEM was signed which provided that the following measures would be implemented:

1. New Saturn doors were installed on the coke side of both batteries to reduce the door leaks.

2. Fuel gas preheaters were installed on both batteries and a combustion air filtering system was installed on the #3 battery. These were added to improve the combustion and lower the opacity from the underfire stacks.

3. Coke side and push side end flue repairs were done on both batteries. This was done to improve the coking process and thus reduce emissions during pushing of coke and from the underfiring stacks.

4. A fume suppression system was installed on the hot metal transfer station and a hood to the existing baghouse was extended over the slag skimming station in the BOF building. This was done to reduce the fugitive emissions being emitted from the BOF building vent.

G. There are still compliance problems at the Gadsden steel plant.

H. Violations are still being cited on the BOF ESP and the BOF building vent on a regular basis.

I. Occasionally, the emissions from the underfire stacks, from the pushing of coke and from the charging of

coal at the coke batteries are exceeding the levels allowed by the regulations.

J. Enforcement actions by ADEM are proceeding to remedy the emission violations at the BOF ESP and the BOF building vent. Probable results of this action would require an additional ESP on the BOF and construction of a baghouse to ventilate operations taking place inside the BOF building.

/s/_____
Richard G. Grusnick, Affiant

Sworn to and subscribed before me this the 31st day of July, 1991.

/s/_____
Notary Public

APPENDIX Y

U.S. Department of Justice
Antitrust Division
Judiciary Corner Building
553 Fourth Street, N.W.
Washington, D.C. 20001

August 19, 1991

HAND DELIVERY

Jerome G. Snider
Davis Polk & Wardwell
1300 I Street, N.W.
Washington, D.C. 20005

Re: *LTV v. Gulf States Steel*

Dear Mr. Snider:

This letter responds to your request of August 16 that I memorialize my recollection of certain events. Prior to doing so, I have had the opportunity to review Volume I of the Exhibits designated by LTV in the litigation.

Much of our discussion on August 16 focused on a letter written by me to Susan Braden on November 6, 1985 ("Exhibit E"). As I told you, I prepared the letter to stimulate discussion between LTV and the Brenlin Group. The letter, including paragraphs 11 (on page 3) and 13 (on page 4), contains my summary of LTV's objections to the initial agreement between Brenlin and the trustee. It is not a summary of any position of the Department. These objections were voiced to the Department at a meeting at LTV headquarters shortly before the letter was drafted. In addition, I told you what recollection I had of the meeting and told you that I recalled generally that future negotiations between LTV and Brenlin included the topics

contained in paragraphs 11 and 13. Finally, I told you that while I believe that I had additional conversations relating to these points, I do not recall them either generally or specifically.

On the topic of electric furnaces, I told you that I recalled that they were included in the original business plan, but that my recollection on that is no greater than can be found in the exhibits. I also told you that I learned, probably a year or more later, that at least a short-term decision not to build electric furnaces had been made. The information was provided by counsel for Brenlin which maintained contact with the Department. I do not recall when the change occurred and do not recall any additional conversations on the topic.

Finally, other than the conversations described above, I have no recollection, either general or specific, of discussions with persons outside of the Department of Justice of what Gadsden environmental liabilities were retained by LTV. I have, of course, had recent discussions with counsel for the parties (or would-be parties such as Alabama) relating to their respective positions in the instant litigation.

Sincerely yours,

/s/_____
J. Robert Kramer II
Assistant Chief
Litigation I Section

APPENDIX Z

GULF STATES STEEL, INC.
AUTHORIZED COSTS

As corrected August 24, 1991

(As of July 31, 1991)

	ACTUAL EXPENDITURES AUTHORIZED					WORK IN PROGRESS/ANTICIPATED EXPENDITURES AUTHORIZED				
	Fiscal Year 1988	Fiscal Year 1989	Fiscal Year 1990	Fiscal Year 1991 Thru July 1991	1988 - July 1991 Total Spent	August - October 1991	Fiscal Year 1992	Total Anticipated Expenditures	Total Costs	Total Authorized
AIR										
COKE PLANT:										
AFE# 9091/9158 Coke Oven Door & Jam	$345,036	$1,385,030	$859,448	$0	$2,589,514	$0	$0	$0	$2,589,514	$2,740,000
AFE# 9179 End Flue/Thru Wall	$0	$1,813,954	$2,518,071	$1,127,071	$5,459,096	$540,904	$0	$540,904	$6,000,000	$6,000,000
AFE# 9203 Benzene Control	$0	$0	$94,103	$2,223,867	$2,317,970	$5,546,849	$1,135,183	$6,682,032	$9,000,002	$9,000,000
BOF/MELT SHOP:										
AFE# 5009/9116 Fume Suppressor	$96,964	$99,602	$0	$0	$196,566	$0	$0	$0	$196,566	$90,000
AFE# 9183/9192 Precipitator	$0	$1,424,952	$68,617	$0	$1,493,569	$0	$0	$0	$1,493,569	$1,410,000
AFE# 9241 Emissions Control (Baghouse, Etc.)	$0	$0	$457	$601,738	$602,195	$100,000	$3,297,805	$3,397,805	$4,000,000	$4,000,000
MATER										
AFE# 9125 Coke Water Treatment Plant	$15,907	$1,414,906	$1,842,807	$24,443	$3,298,063	$0	$0	$0	$3,298,063	$3,350,000
AFE# 9124 Galvanizing Line Water Treatment Plant	$31,563	$1,492,246	$598,623	$5,953	$2,128,385	$0	$0	$0	$2,128,385	$2,000,000
Total	$489,470	$7,630,960	$5,982,126	$3,983,072	$18,085,358	$6,187,753	$4,432,988	$10,620,741	$28,706,099	$28,590,000

APPENDIX AA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re

CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,

Debtors.

THE LTV CORPORATION, LTV STEEL COMPANY, INC. and GULF STATES STEEL CORPORATION

Plaintiffs,

v.

GULF STATES STEEL, INC.,

Defendant.

In Proceedings For A Reorganization Under Chapter 11
Case Nos. 86 B 11270 Through 86 B 11334 (BRL)
Inclusive, 86 B 11402 (BRL) and 86 B 11464 (BRL)

Adv. Proc. No. 91-5110-A (BRL)
91 Civ. 1826 (LLS)

RESPONSE OF THE STATE OF ALABAMA
TO PLAINTIFF'S APRIL 4, 1991
MEMORANDUM IN OPPOSITION

James H. Evans
Attorney General
State of Alabama
11 South Union Street
Montgomery, Alabama 36103

Dated: April 8, 1991

Marc Givhan
Chief, Antitrust Section
Office of the Attorney General
State of Alabama
11 South Union Street
Montgomery, Alabama 36103
(205) 242-7331

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,

Debtors.

THE LTV CORPORATION,
LTV STEEL COMPANY, INC.
and GULF STATES STEEL CORPORATION

Plaintiffs,

v.

GULF STATES STEEL, INC.,

Defendant.

In Proceedings For A Reorganization Under Chapter 11
Case Nos. 86 B 11270 Through 86 B 11334 (BRL)
Inclusive, 86 B 11402 (BRL) and 86 B 11464 (BRL)

Adv. Proc. No. 91-5110-A (BRL)
91 Civ. 1826 (LLS)

RESPONSE OF THE STATE OF ALABAMA
TO PLAINTIFF'S APRIL 4, 1991
MEMORANDUM IN OPPOSITION

The issue presented by the State of Alabama's ("Alabama") Motion to Intervene is as follows:

> Considering the significant impact of the instant dispute between LTV Corporation ("LTV") and Gulf States Steel, Inc. ("GSSI") on Alabama's competitive and environmental interests, should Alabama be

> granted the right to intervene to seek withdrawal of the reference and transfer venue to Judge Pratt of the District Court for the District of Columbia, since Alabama's rights were created by Orders of the Court?

While Alabama's April 1, 1991 Memorandum fully addressed the aggregate requirements of Rule 24(a), Fed. R. Civ. P., this response will address each of the elements therein.

The requirement of Rule 24(a) Fed. R. Civ. P. that an applicant show an interest in the property or transaction, which is the subject of the section is, in essence, a standing test. As Alabama's April 1, 1991 memorandum in Support made clear, the Supreme Court, in *California v. American Stores, Co.*, 110 S. Ct. 1853 (1990), held unanimously that a state Attorney General has standing to seek divestiture under section 16 of the Clayton Act, 15 U.S.C. § 26.

> We agree that the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations.

Id. at 1859. Having standing to seek divestiture as an equitable remedy inherently conveys the requisite standing to enforce the divestiture obtained. *Id.* at 1867. *See e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350 (2nd Cir. 1975); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) (standing element of Rule 24(a) is to be construed broadly particularly where a governmental entity seeks intervention). Here, Alabama's intervention to withdraw the reference and transfer venue seeks enforcement of the divestiture of the Gadsden plant, according to the terms of the Final Judgment of Judge Pratt's subsequent Orders, which conveyed both competitive and environmental benefits to the citizens of Alabama.

An interest in the subject matter of the dispute also entails that the applicant have a direct interest in the dispute between the initial litigants. Alabama, like the United States has an interest in a competitive steel industry and the creation of a viable competitor in that market, but Alabama has a more compelling and direct interest in maintaining GSSI as a viable ongoing competitor that is in compliance with Alabama's environmental laws and regulations. Alabama is also without question a direct beneficiary of the Final Judgement, which sets forth the circumstances under which LTV may be required to assume all liabilities of the Gadsden plant, including environmental. It is well established in this Circuit that an intended beneficiary of a consent decree has a sufficient interest to be granted the status of an intervenor. *See, e.g., Berger v. Heckler*, 771 F.2d 1556, 1564 (2d Cir. 1985). (Nonparties to original consent decree could seek to enforce decree entered in their favor.) Alabama has a direct interest in the divestiture of the Gadsden plant that preexists and is separate and apart from GSSI's interest, although it also has a related interest in having LTV indemnify GSSI for certain environmental liabilities to the extent such indemnification conveys competitive and environmental benefits to the citizens of Alabama.

Rule 24(a) further requires that the applicant be so situated that the disposition of the instant dispute may, as a practical matter, impair or impede Alabama's ability to obtain the competitive and environmental benefits intended by the Final Judgment and Judge Pratt's subsequent Orders. In light of LTV's bankruptcy proceedings, of the instant dispute may, as a practical matter, impair or impede Alabama's ability to protect that interest. More importantly, since Alabama could be adversely affected by any interpretation and enforcement of Judge Pratt's Orders, Alabama should be allowed to intervene to protect its interests in that regard. *See e.g., Oneida Indian Nation of Wisconsin v. New York*, 732 F.2d 261 (2d Cir. 1984). (Intervention

granted where interests of proposed intervenors may be adversely affected by principles of *stare decisis*.)

Finally, Rule 24(a) requires that applicant's interests not be adequately protected by the existing parties. A determination as to the full extent of any LTV environmental liabilities has not yet been made. GSSI may seek indemnification for certain environmental corrections to assets purchased from LTV that Alabama may or may not agree should be considered as liabilities of LTV, as of January 31, 1986. Moreover, GSSI may not have an interest in identifying and seeking indemnity as to all LTV environmental liabilities, if any, to the extent that they exceed the $31 million at issue. If any LTV environmental liabilities are not fully assumed, which should be under the Final Judgment and Judge Pratt's subsequent Orders, Alabama, as a practical matter, may be foreclosed from obtaining this benefit for its citizens. Therefore, Alabama should be granted the right to intervene to protect its interests to assure that any LTV liabilities are properly identified and properly assumed.

Alabama has significant protectable competitive and environmental interests which may be impaired or impeded if it is not allowed to intervene to withdraw the reference and transfer venue which will not adequately be protected by the existing parties.

Accordingly, Alabama should be granted the right to intervene in the proceedings before this Court to withdraw the reference and transfer venue to Judge Pratt.

Respectfully submitted,

/s/_____

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Dated: April 8, 1991

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Response of the State of Alabama to Plaintiff's April 4, 1991 Memorandum in Opposition were served by hand this 9th day of April, 1991, on the following:

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Dated: April 9, 1991

APPENDIX BB

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LTV CORPORATION, ET AL.,

PLAINTIFFS,

V.

GULF STATES STEEL, INC.,
OF ALABAMA,

DEFENDANT.

CIVIL ACTION NO. 91-1072
WASHINGTON, D.C.

COURTROOM NO. 12
FRIDAY, JUNE 14, 1991
1:30 P.M.

TRANSCRIPT OF HEARING ON MOTIONS BEFORE THE HONORABLE JOHN H. PRATT UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	KAREN E. WAGNER, ESQ. R. SCOTT THOMPSON, ESQ. DAVIS POLK & WARDELL 1 CHASE MANHATTAN PLAZA NEW YORK, NEW YORK 10005
FOR THE DEFENDANT:	BETTY SOUTHARD MURPHY, ESQ. NANCY E. SHALLOW, ESQ. BAKER & HOSTETLER

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FOR THE STEEL COMMITTEE:	EDWARD B. HORAHAN, III, ESQ. STROOCK, STROOCK & LAVAN 1150 17TH STREET, N.W. WASHINGTON, D.C. 20036
OFFICIAL COURT REPORTER:	GLORIA I. WILLIAMS-202 289-4470

COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

[p.19]

THE COURT: THANK YOU.

MS.MURPHY.

MS.MURPHY: NO, YOUR HONOR. THANK YOU.

THE COURT: WELL, AS MIGHT BE JUDGED BY THE QUESTIONS WE HAVE ASKED, WE ARE GOING TO GRANT THE MOTION OF GULF STATES STEEL, INC., TO DEPOSIT CERTAIN MONIES IN ESCROW SUBJECT TO

AND PENDING FURTHER ORDERS OF THE COURT, WITH RESPECT TO THAT MS. MURPHY, IF YOU WOULD SUBMIT AN ORDER COVERING THE GIST OF WHAT YOU HAVE SET FORTH IN AT LEAST ONE PLACE IN YOUR MEMORANDUM AND CHECK IT OUT WITH MS. WAGNER AS TO FORM, WE WILL SIGN IT WHEN WE GET IT.

NOW, WITH RESPECT TO LTV'S MOTION FOR SUMMARY JUDGEMENT, WE ARE PREPARED TO HEAR ARGUMENT ON THAT, BUT WE WILL NOT DECIDE THAT TODAY. MS. WAGNER, WOULD YOU LIKE TO PROCEED?

MS. WAGNER: I WOULD, YOUR HONOR. THANK YOU.

YOUR HONOR, WE ARE HERE TODAY ON LTV'S MOTION FOR SUMMARY JUDGEMENT FOR AMOUNTS DUE UNDER A PROMISSORY NOTE. AS YOUR HONOR IS AWARE, THERE IS NO DISPUTE AS TO THE ISSUANCE OF THE NOTE TO THE ISSUANCE OF THE NOTE OR TO THE AMOUNTS THAT ARE DUE UNDER THE NOTE. FOR THAT REASON, WE MOVED FOR SUMMARY JUDGEMENT WHEN WE BEGAN THIS PROCEEDING IN THE BANKRUPTCY COURT.

GULF STATES HAS ARGUED THAT IT HAS RIGHT OF RECOUPMENT. CAN YOU HEAR ME, YOUR HONOR?

THE COURT: GO AHEAD. YES.

[p.20] MS.WAGNER: GULF STATES HAS ARGUED THAT IT HAS RIGHT OF RECOUPMENT. WE ARGUE THAT THEY HAVE NOT STATED IN THEIR PAPERS ANY BASIS FOR A RIGHT OF RECOUPMENT AND, THEREFORE, THERE IS NO MATERIAL ISSUE OF FACT WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGEMENT TODAY.

YOUR HONOR, GULF STATES' ARGUMENT ESSENTIALLY IS THAT GULF STATES WAS INTENDED, UNDER THIS COURT'S ORDERS, TO BE A VIABLE COMPETITOR AND THAT THAT MEANS THAT GULF STATES IS ENTITLED TO RECOVER FROM LTV AND ITS CREDITORS THE COST OF ENVIRONMENTAL OPERATIONAL MONIES REQUIRED TO UPDATE THE EQUIPMENT AT THE PLANT FOR TIMES GOING FORWARD FROM THE TIME OF THE CLOSING. GULF STATES APPEARS TO RECOGNIZE THAT THE CONTRACT ITSELF DOES NOT SUPPORT THIS POSITION.

IN ADDITION, YOUR HONOR, WE WOULD CONTEND THAT THEIR CLAIM IS BARRED UNDER THE BAR ORDER OF THE BANKRUPTCY COURT IN NEW YORK. HOWEVER, GULF STATES ARGUES IN THE FACE OF THOSE DOCUMENTS THAT THEY ARE ENTITLED TO THESE FUNDS BECAUSE THIS COURT INTENDED THAT THEY BE A VIABLE COMPETITOR.

GULF STATES IS A VIABLE COMPETITOR, NUMBER ONE. THE AFFIDAVIT SUBMITTED TO YOU BY MR. VAN TIEM SUGGESTS GULF STATES IS CERTAINLY A VIABLE COMPETITOR AND WHILE MR. VAN TIEM SUGGESTS THAT IT IS NOT A STATE OF THE ART COMPETITOR, WE WOULD ARGUE THAT YOUR HONOR'S INTENTION WAS NOT THAT LTV CONTINUE TO PAY FOR GULF STATES SO THAT IT BE STATE OF THE ART. IT IS VIABLE. IT IS COMPETING. IT HAS DONE BETTER THAN EXPECTED, AND WE WOULD ARGUE [p.21] THERE IS NO ARGUMENT HERE BASED ON YOUR HONOR'S ORDERS OR BASED ON THE CONTRACT THAT LTV SHOULD BE LIABLE FOR ANY OF THESE ENVIRONMENTAL EXPENDITURES.

YOUR HONOR, WITH YOUR PERMISSION I WOULD LIKE TO GO BRIEFLY INTO THE HISTORY OF THE

TRANSACTION AS I UNDERSTAND IT, INTO THE DOCUMENTS ITSELF, AND INTO THE ACTIONS OF THE PARTIES SINCE THAT TIME.

YOUR HONOR, IN AUGUST OF 1984, YOU ORDERED THAT GADSDEN MUST BE DIVESTED. YOUR ORDER INDICATED THAT THE PLANT MUST BE DIVESTED FREE AND CLEAR OF MORTGAGES AND LIENS, CONTRACTUAL LIABILITIES, PENSION LIABILITIES, AND TERMINATION CLAIMS. YOUR HONOR'S ORDER DOES NOT MAKE REFERENCE TO ANY ENVIRONMENTAL LIABILITIES.

AS YOU KNOW, THERE WAS SOME DIFFICULTY SELLING GADSDEN, AND THE COURT APPOINTED A TRUSTEE.

THE COURT: YES, WE HAD TO APPOINT THE OPPENHEIMER COMPANY AS THE TRUSTEE AND FINALLY THEY LOCATED THE BRENNAN GROUP AS THE BUYER.

MS. WAGNER: THAT'S CORRECT, YOUR HONOR.

THE COURT: THEN WE HAD SOME PROBLEMS WITH RESPECT TO THE OPPENHEIMER'S REPORT. WE HAD TO RULE ON OBJECTIONS. WE HAD PROBLEMS WITH THE LABOR UNIONS AND A NUMBER OF OTHER THINGS.

MS. WAGNER: CORRECT, YOUR HONOR.

THE COURT: AND WE HAD TO FILE, AS I RECALL IT, SOME KIND OF OPINION WITH RESPECT TO WHETHER THIS FIT WITHIN, I GUESS, THE PRESCRIPTIONS OF THE TUNNEY ACT, OR WHATEVER IT WAS [p.22] THAT THAT THE ANTITRUST DIVISION WAS ADMINISTERING, BUT WE VISITED THIS CASE FOUR OR FIVE TIMES, I THINK, BEGINNING SEVEN YEARS AGO.

MS. WAGNER: THAT'S CORRECT, YOUR HONOR, AND I HAVE, IN PREPARATION FOR THIS ARGUMENT, REVIEWED MANY OF THE TRANSCRIPTS, AND LETTERS, AND VARIOUS CORRESPONDENCE THAT OCCURRED OVER THAT PERIOD OF TIME, AND I WAS STRUCK BY THE FACT THAT THERE IS NO MENTION IN ANY OF THESE DOCUMENTS OF ENVIRONMENTAL LIABILITIES, EXCEPT FOR ONE SMALL AREA IN WHICH WE WERE CONCERNED ABOUT THE LANGUAGE IN THE DRAFT PROPOSAL THAT GULF STATES SUBMITTED FOR PURCHASE OF THE PLANT. WE MADE OUR OBJECTIONS KNOWN TO THE TRUSTEE. THE TRUSTEE SUGGESTED —

THE COURT: THEY TALK ABOUT LIABILITIES, DON'T THEY, THAT IS, THE ASSETS PURCHASE AGREEMENT?

MS. WAGNER: CERTAINLY DO, YOUR HONOR, ABSOLUTELY, AND I CERTAINLY WILL ADDRESS THAT.

THE COURT: AND IT TALKS ABOUT ASSUMPTION OF LIABILITIES WHEREBY GSSI IN NO MANNER ASSUMES OR AGREES TO PAY ANY LTV LIABILITY, WHETHER PRIMARY OR SECONDARY, DIRECT OR INDIRECT, ABSOLUTE OR CONTINGENT. NEXT, LTV AGREES TO RETAIN AND ASSUME ALL LIABILITIES OF THE PLANT AND BUSINESS AND AGREES THAT GSSI SHALL NOT ASSUME OR BE BOUND BY ANY LIABILITIES OR OBLIGATIONS OF LTV OR ANY KIND OR NATURE, CONTINGENT OR OTHERWISE. NEXT IS A PROVISION WITH RESPECT TO INDEMNIFICATION BY LTV. AND, FINALLY, WHEN LTV FILED ITS OBJECTIONS [p.23] TO THE AGREEMENT, IT STATED THAT LTV IS NOT REQUIRED BY THE FINAL JUDGMENT TO ASSUME ANY LIABILITY TO FUND AFTER CLOSING

THE COST OF ANY CORRECTIVE ACTION REQUIRED TO BE TAKEN WITH RESPECT TO THE DIVESTED ASSETS UNDER ANY APPLICABLE ENVIRONMENTAL LAW OR REGULATION. AND WE DIDN'T BUY THAT. WE OVERRULED THAT OBJECTION.

SO, I THINK THE CLEAR INTENT, MS. WAGNER, WITH ALL DUE RESPECT, WAS THAT WHEN WE SAID "LIABILITY," WE MEANT ALL LIABILITIES. WHEN WE TALKED ABOUT INDEMNIFICATION, WE TALKED IN BROAD TERMS, SIMILARLY WITH RESPECT TO NON-ASSUMPTION OF LIABILITIES.

I MAY BE MISSING SOMETHING, BUT I DON'T THINK THERE'S ANY DOUBT AS TO WHAT WE HAD IN MIND OR THE FACT THAT THE ISSUE OF LIABILITIES INCURRED BY LTV PRIOR TO CLOSING WERE LIABILITIES WHICH LTV WOULD MEET AND THAT ANYTHING HAPPENING AFTER THE DATE OF CLOSING, JANUARY 31, 1986, WOULD BE THE JOB OF THE BRENNAN GROUP.

MS. WAGNER: YOUR HONOR, THAT'S EXACTLY HOW I READ THE CONTRACT AS WELL, AND I GUESS THE DISPUTE BEFORE YOU TODAY IS WHETHER OR NOT THERE HAS BEEN ANY ALLEGATION THAT ANY OF THE COSTS WHICH GULF STATES NOW SEEKS ARISE FROM OPERATIONAL EVENTS WHICH OCCURRED PRIOR TO THE CLOSING. IF YOU REVIEW THE AFFIDAVITS THAT HAVE BEEN PUT BEFORE YOU, AND IF YOU COMPARE THEM WITH THE CONTRACT THAT WAS SIGNED, I BELIEVE YOU WILL DETERMINE THAT THERE IS NO ARGUMENT SET BEFORE YOU, NO [p.24] FACTUAL BASIS FOR AN ARGUMENT THAT GULF STATES IS SEEKING RECOVERY OF FUNDS FOR OPERATIONAL COSTS INCURRED PRIOR TO THE CLOSING. ALL OF THE COSTS GULF STATES IS SEEK-

ING OCCURRED AFTER THE CLOSING, AND WE WOULD SUBMIT THAT THE CONTRACT WHICH PROVIDES FOR INDEMNIFICATIONS GOING BOTH WAYS —

THE COURT: SOME OF THE PAYMENTS THAT THEY MADE, SUBSTANTIAL PAYMENTS, WERE MADE WITHIN A MATTER OF A FEW WEEKS AFTER JANUARY 31ST.

MS. WAGNER: THAT'S CORRECT, YOUR HONOR, AND IF YOUR HONOR —

THE COURT: AND, AS A MATTER OF JUST PLAIN COMMON SENSE, THEY HAD TO RELATE BACK TO WHAT LTV WAS DOING OR HAD INCURRED PRIOR TO CLOSING.

MS. WAGNER: THAT IS CORRECT, YOUR HONOR, AND IF YOUR HONOR WOULD PERMIT ME, I WOULD LIKE TO READ TO YOUR HONOR A SECTION OF THE CONTRACT WHICH I BELIEVE GOVERNS HERE, THAT WOULD SUGGEST, TO ME CERTAINLY, THAT LTV'S OBLIGATION WAS TO DISCLOSE TO GULF STATES WHAT THE FUTURE COSTS WERE GOING TO BE, THE POST-CLOSING OPERATIONAL COSTS, WHICH INCLUDED COSTS WHICH WOULD ARISE RIGHT AFTER THE CLOSING. ONCE LTV DISCLOSED IT, GULF STATES COULD DO ONE OF TWO THINGS. THEY COULD EITHER OBJECT AND NOT CLOSE, OR THEY COULD COME TO THE COURT FOR SOME MODIFICATION. THEY DID NOT DO THAT. THEY SIGNED A CONTRACT WHICH SAYS — AND IF YOUR HONOR WILL PERMIT ME, I WOULD LIKE TO READ IT, BECAUSE I THINK THE LANGUAGE IS EXTREMELY STRONG.

APPENDIX CC

90-5024(L)

To be argued by
Karen E. Wagner, Esq.

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 90-5024, 90-5028, 90-5030,
90-5034, 90-5038, 90-5040, 90-5042

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, ET AL.,

Debtors.

(*continued on inside front cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES AND CROSS-APPELLANTS THE LTV CORPORATION, LTV STEEL COMPANY, INC. AND ALL AFFILIATED DEBTORS

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[p.15]. . . . case law, and the interrelationship of various Code sections."). Even the Third Circuit has now retreated from *Frenville*. *See In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988).

For bankruptcy purposes, a claim under an environmental statute comes into existence when the debtor acts so as to give rise to a predicate for liability under the statute. For example, under Section 107 of CERCLA, 42 U.S.C. § 9607, and its state-law progeny, a claim arises when a debtor who generates hazardous substances has acted by arranging for the storage, disposal or treatment of those hazardous substances. While for non-bankruptcy purposes the contingency that the government act is necessary to ripen the government's cause of action under Section 107, it is the debtor's act alone that creates a "claim" under the Bankruptcy Code. It is precisely such contingent obligations which are intended to be encompassed by the Code's definition of "claim."

In expanding the definition of "claim," Congress recognized that, in many legal relationships, one element required for liability may be temporally remote from the element bringing the legal obligation into existence, but that in such cases a bankruptcy "claim" must be recognized. Thus, in the tort context, an actor may cause the invasion of the legally protected interest of another without promptly giving rise to harm. *Restatement (Second) of Torts* § 7 comment a (1965). In such a case the party whose interest has been invaded will have suffered no compensable injury and, in some states, may temporarily lack a cause of action. *See, e.g., In re UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) (Posner, J.) (noting that whether unascertained asbestos victims have causes of action under non-bankruptcy law varies among the states). Nevertheless, under bankruptcy law, the party whose interest has been invaded as a result of the debtor's action holds a contingent claim against the debtor. *See In re Johns-Manville Corp.*, 57 B.R. at 690 ("the

focus should be on the time when the acts giving rise to the alleged liability were performed"); *In re Edge*, 60 B.R. at 699 (liability arising from debtor's alleged negligent dental service constituted a . . . .